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The Ordinance of William the Conqueror (1072)— Its Implications in the Modern Law of Succession

By ALISON REPPY*

I. INTRODUCTION

SOME years ago, in bringing to a close a short sketch on the Historical and Statutory Background of Wills,¹ attention was directed to the ancient common-law rule that where a will devising real estate and bequeathing personal property was admitted to probate, the decree was only prima facie evidence as to the title to the realty, although conclusive as to personalty. Investigation revealed that this rule of law² had been in full force

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¹ REPPY and TOMPKINS, *THE HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS* (Chicago, 1928).

² *United States*: *Campbell v. Porter*, 162 U.S. 478, 40 L. Ed. 1044, 16 S. Ct. 871 (1896); *Harrison v. Rowan*, 3 Wash. C.C. 580, Fed. Case No. 6141 (1820).

Massachusetts: *Parker v. Parker*, 65 Mass. (11 Cush.) 519 (1853).

New Jersey: *Den v. Ayers*, 13 N.J.L. 153 (1832).

Pennsylvania: *Smith v. Bonsall*, 5 Rawle (Pa.) 80 (1835); *Rowland v. Evans*, 6 Pa. 435 (1847).

South Carolina: *Brown v. Gibson*, 10 S. Car. L. (1 Nott & McC.) 326 (1818); *Crosland v. Murdock*, 15 S. Car. L. (4 McCord) 217 (1827).

Virginia: *Ballow v. Hudson*, 54 Va. (13 Gratt.) 672 (1857).

See also, Warren, *Problems in Probate and Administration*, 32 HARV. L. REV. 315 (1919).

A decree of probate admitting a will of real and personal property to probate is conclusive evidence as to title to personalty, but only prima facie evidence as to title to real estate.

English: *King v. Inhabitants of Netherseal*, 4 T. R. 258, 100 Eng. Rep. 1006 (1791); *Duchess of Kingston*, 11 Harg. St. Tr. 261, 20 How. St. Tr. 355 (1776); *Marriott v. Marriott*, 1 Str. 666, 93 Eng. Rep. 770 (1726); *Habergham v. Vincent*, 2 Ves. Jr. 223, 30 Eng. Rep. 595 (1792).

United States: *Tompkins v. Tompkins*, 1 Story 547, Fed. Cas. No. 14091, 24 Fed. Cas. 401 (1841).

Alabama: *Knox v. Paull*, 95 Ala. 505, 11 So. 156 (1892).

Delaware: *Cummins v. Cummins*, 1 Marv. (Del.) 423, 31 Atl. 816 (1895).

Illinois: *Luther v. Luther*, 122 Ill. 553, 13 N.E. 166 (1887); *Barnett v. Barnett*, 284 Ill. 580, 120 N.E. 532 (1918).

Iowa: *Kosteletzky v. Scherhart*, 99 Iowa 120, 68 N.W. 591 (1896).

Kansas: *Meyers v. Smith*, 50 Kan. 1, 31 Pac. 670 (1892).

and effect at an early date in several states and in New York as late as the year 1910.³ This raised interesting questions as to the origin of the rule, how it came to be the law in New York, why the doctrine was changed in 1910, and whether there was any connection between this development and the adoption by New York in 1930 of its new Statute of Devolution,⁴ which, for purposes of descent and distribution, abolished the distinctions between real and personal property. The answer to these queries can only be discovered by resort to the historical background of the law of succession, which had its foundations in principles of English feudal policy.⁵

II. THE BACKGROUND AND ORIGIN OF THE ORDINANCE

Prior to the Norman Conquest, Norman law had developed an ecclesiastical jurisprudence as a result of long conflicts between the church and the state, which conflicts had been settled by compacts under which each organization, by way of compromise, was assigned a given sphere of operation. But the church, long accustomed to undivided jurisdiction, stood ever ready to press its claim of supremacy.⁶ In this situation, William

Kentucky: Allen v. Froman, 96 Ky. 313, 28 S.W. 497 (1894).

Massachusetts: Cooper v. Monroe, 237 Mass. 192, 129 N.E. 436 (1921); Mitchell v. Weaver, 242 Mass. 331, 136 N.E. 166 (1922).

Minnesota: Babcock v. Collins, 60 Minn. 73, 61 N.W. 1020 (1895).

Mississippi: Virginia Trust Co. v. Buford, 123 Miss. 572, 86 So. 356 (1920), (suggestion of error denied, Virginia Trust Co. v. Buford, 123 Miss. 572, 86 So. 516 (1920)).

Missouri: Graham v. Graham, 297 Mo. 290, 249 S.W. 37 (1923).

North Carolina: Osborne v. Leake, 89 N.C. 433 (1883).

Ohio: Swasey v. Blackman, 8 Ohio 5 (1837); Woodbridge v. Banning, 14 O.S. 328 (1863).

Pennsylvania: Wilson v. Gaston, 92 Pa. 207 (1879); Wall v. Wall, 123 Pa. 545, 16 Atl. 598 (1889).

Tennessee: Wright v. Smithson, 75 Tenn. (7 Lea) 12 (1896).

Vermont: Domestic Missionary Society v. Eells, 68 Vt. 497, 35 Atl. 463 (1896).

Wisconsin: O'Dell v. Rogers, 44 Wis. 136 (1878).

³ In re Goldsticker's Will, 192 N.Y. 35, 84 N.E. 531 (1908). But the rule was changed by statute two years later. N.Y. Laws 1910, c. 578, p. 1416. See, also, N.Y. Laws 1914, c. 443, § 2250, p. 1775.

⁴ N.Y. Laws 1939, amending N.Y. Laws 1909, Real Property Law, Art. III.

⁵ REEVES, TREATISE ON THE LAW OF DESCENTS IN THE SEVERAL STATES, Preface, i, ii, (New York, 1825).

⁶ I POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, Bk. I, c. II, 52 (Cambridge, 1895).

the Conqueror, in his relations with the church in Normandy, was careful to keep the affairs of the church and state separate. Nevertheless, being of a religious turn, he sought reform within the church, insisting upon a strict observance of monastic life, the improvement of the knowledge and morals of the secular clergy, and the development of a system of ecclesiastical law. He was determined, as a matter of policy, that in his dominions the church should remain subordinate to the state. In short, it may be said that, in a broad sense, William was pledged to maintain these religious concepts wherever his influence became dominant.⁷ And it was, therefore, inevitable that the conquest should bring England into the middle of a dormant controversy. If the Conqueror was to avoid difficulties, he "would have to define in precise terms his relation to the spiritual power in his new Kingdom, and his definition would, if this were possible, be the definition which had come down to him from Norman dukes and Frankish Kings. On the one hand he would have to concede an ample room to 'the canons and episcopal law,' on the other hand, he would insist that the spiritual power should assume no right in England that it had not exercised in Normandy."⁸ In Normandy, William's right hand adviser was Lanfranc,⁹ a lawyer who was versed in Lombard, Roman and Canon law. When, therefore, the time came for subduing England and establishing what he regarded as the true relationship between church and state, the man of arms had behind him not only a great theologian but also a great lawyer, to aid in the institution of a policy which was to be implemented within six years after the battle of Hastings.

After the conquest, tremendous social, economic, political and religious changes took place in England. These changes were not to be imposed by a foreign code, for William was not desirous of importing Norman law as a body. Nor were these two streams of law meeting to form a single river. In whatever mixture of law was to ensue, English law had the advantage, as a great portion

⁷ EADMERI, *HISTORIA NOVIORUM*, p. 9.

⁸ I POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW*, Bk. I, c. II, 52 (Cambridge, 1895).

⁹ *Id.* at 54. But compare the statement of Plucknett, who observes: "In the twelfth century . . . it is impossible to distinguish the lawyer from the statesman and the politician; men such as Glanvill and Beckett, Lanfranc and Herbert Walter, must have had considerable influence upon legal development, but still we can hardly describe them as lawyers." A CONCISE HISTORY OF THE COMMON LAW, Pt. II, c. 13, 222 (4th ed. London, 1948).

of it was in writing.¹⁰ The changes which occurred, therefore, were brought about within the frame-work of a centralized crown, aided and supported by the introduction into England of Norman feudalism, under which estates in land were to be held through tenure, and by Norman state-church relationships, under which the church was to occupy a subordinate position. Thus, when William came to consider the problem of reorganizing the existing agencies of law and justice, he found the bishop and the earl presiding over the assembly of thegns, free men and priests which constituted the shire court.¹¹ The local courts of the shire and hundred exercised jurisdiction over subject matter which, in Normandy, would have been regarded as properly within the province of an ecclesiastical court. It is not surprising, therefore, to find William, in accordance with his life-long policy in Normandy, and doubtless with the advice and encouragement of Lanfranc, taking steps to separate the ecclesiastical and common-law courts. This end was accomplished in 1072 by what is now referred to as the Ordinance of William the Conqueror.¹² It provided that the church men should no longer carry on ecclesiastical business in the Hundred and County Courts, but should thereafter transact their affairs in their own special courts presided

¹⁰ 1 POLLOCK AND MATTLAND, HISTORY OF ENGLISH LAW, Bk. I, c. III, 57 (Cambridge, 1895).

¹¹ "One certain and very well-known peculiarity of the Anglo-Saxon period is that secular and ecclesiastical courts were not separated and the two jurisdictions were hardly distinguished. The bishop sat in the county court; the church claimed for him a large share in the direction of even secular justice, and the claim was fully allowed by princes who could not be charged with weakness. Probably the bishop was the only member of the court who possessed any learning or any systematic training in public affairs." 1 POLLOCK AND MATTLAND, HISTORY OF ENGLISH LAW, Bk. I, c. I, 17 (Cambridge, 1895).

¹² The Ordinance of William the Conqueror reads as follows:

"No Bishop or Archdeacon, do henceforth hold pleas in the Hundred concerning episcopal laws, nor bring any cause which belongs to the government of souls to the judgment of secular men, but that whosoever according to the Episcopal Laws, shall for what cause or fault soever be summoned, shall come to a place which the Bishop shall choose and name for this purpose, and there make answer concerning his cause, and do right to God and his Bishop, not according to the Hundred, but according to the Canons and Episcopal Laws."

Taken from Introductory Note, XI, 1 Bradf. Sur. Rep. xx (1872).

This date, of the Ordinance of William the Conqueror, formerly regarded as uncertain, has now been assigned to this document in a note by Walker, *The Date of the Conqueror's Ordinance Separating the Ecclesiastical and Lay Courts*, 39 ENGLISH HIST. REV. 400 (1924). Cf. Lichtenstein, *The Date of Separation of Ecclesiastical and Lay Jurisdiction in England*, 3 ILL. L. REV. 347 (1909).

For an early discussion of the separation of the spiritual and lay courts, see 1 Reeves, HISTORY OF THE ENGLISH LAW, c. II, 283-289 (Finlason's Am. ed., Philadelphia, 1880).

over by members of the clergy, the idea being to develop both an ecclesiastical procedural and substantive body of canon law.¹³

III. GENERAL SUGGESTIONS AS TO POSSIBLE IMPLICATIONS OF THE SEPARATION OF THE ECCLESIASTICAL AND COMMON LAW COURTS

This early separation of the common law and ecclesiastical courts¹⁴ was bound to have tremendous effect upon the future development of English law. For one thing it made certain the full-fledged growth of the canon law system, which, when fully developed on its substantive and procedural sides, was to compete with law and equity for jurisdiction in many fields.¹⁵ The origin and development of that great procedural device—the writ of prohibition—was one of the by-products of the conflict which was waged for years between the common law and ecclesiastical courts, it being the principal instrument by which the common law courts first resisted spiritual invasions in some fields of jurisdiction and later completely barred them in others.¹⁶ It seems not unlikely that the separation may have influenced the language of early English pleading, in the sense that it gave those who presided over the ecclesiastical courts and who were trained in Latin and Norman French, a more dignified status than they

¹³ I POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW*, Bk. I, c. III, 67 (Cambridge, 1895). See, also, article by Setaro, *A Prologue to a History of the English Ecclesiastical Law*, 6 B.U.L. REV. 358 (1936).

¹⁴ REPPY AND TOMPKINS, *THE HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS*, Ch. III, 96-181 (Chicago, 1928).

¹⁵ *Id.* at 145-150.

¹⁶ In an article by Wolfram, *The "Ancient and Just" Writ of Prohibition in New York*, 52 COL. L. REV. 334 (1952), in referring to this very matter, the author states:

"William the Conqueror separated the ecclesiastical from the temporal courts of England and touched off four centuries of incessant conflict over their respective jurisdictions. The Law courts employed new weapons, the clergy resorted to the old. Writs of prohibition, upholding the prerogative of the throne, issued out of the king's court to check the steadily increasing influence of the church; in retaliation, excommunications thundered out against lay judges, and both oaths and contracts, abjuring the right to apply to the civil authorities, were extracted from individual litigants by the clergy. The late thirteenth century saw the growth of a strong national spirit expressed in greater loyalty to the king, and the temporal judges, encouraged to defy excommunications and to disregard ecclesiastical oaths and contracts, for the first time succeeded in confining the courts Christian 'within their just and proper limits.' The church's angry protests against the writs, directed to Parliament in 1316, resulted only in the statute *De Articulis Cleri* which narrowed the jurisdiction of the Catholic courts to causes testamentary and matrimonial."

might otherwise have enjoyed and a greater voice in determining the nature and content of the pleadings and the records.¹⁷ It presaged and perhaps was a factor in Bracton's classification of the common-law actions as real, personal and mixed, as the separation of the lay from the spiritual courts accentuated the tendency of property to fall into the two classifications of real and personal property, which distinction lay at the bottom of the classification of actions;¹⁸ it was largely responsible for the so-called fundamental distinctions between real and personal property, which for many years have been the subject of first-year instruction in our schools of law;¹⁹ it was related to, if indeed, it did not encourage, the development of that much misunderstood doctrine—*actio personalis moritur cum persona*—that the death of either party to a personal duty takes away all remedy and destroys the duty. Such a doctrine, if strictly applied, would have prevented the ecclesiastical court, through its representative—the executor or administrator—from protecting the dead man's estate.²⁰ If this be true, as the principle that a right of action could not be assigned at common law was related to the maxim *actio personalis moritur cum persona*—the division of the common law and ecclesiastical jurisdictions was not unrelated to the assignability of rights of actions.²¹ In this field of venue of actions it probably influenced the development of the distinction between local and transitory actions to the extent that it emphasized the

¹⁷ 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, Bk. I, c. III, 58-66 (Cambridge, 1895). It has been said in this connection that "The Bishops took pains to learn the tongue of the common people. . . ." Lichtenstein, *The Date of the Separation of Ecclesiastical and Lay Jurisdictions in England*, 3 ILL. L. REV. 347, 349 (1909).

¹⁸ 3 STREET, FOUNDATIONS OF LEGAL LIABILITY, c. IV, *Classification of Actions in the Common Law System*, 37-41 (Northport, 1906).

¹⁹ Lord Holdsworth, in referring to this very matter, but without discussing it in detail, observed:

"This abandonment of jurisdiction to the ecclesiastical courts has tended, more than any other single cause, to accentuate the difference between real and personal property; for even when the ecclesiastical courts had ceased to exercise some parts of this jurisdiction, the law which they had created was exercised by their successors." 1 HOLDSWORTH, HISTORY OF ENGLISH LAW, c. VII, 625 (4th ed., Boston, 1931).

²⁰ 3 STREET, FOUNDATIONS OF LEGAL LIABILITY, c. VI, *Actio Personalis cum Persona*, 62 (Northport, 1906):

"The development of a satisfactory theory of succession and representation in the estate of deceased persons undoubtedly contributed much to impeach the broad doctrine that a personal right of action perishes with the death of either party."

²¹ 3 STREET, FOUNDATIONS OF LEGAL LIABILITY, c. VII, *Assignment of Right of Action*, 76-89 (Northport, 1906).

artificial distinction between real and personal property.²² And, finally, as we shall see, it exercised a profound and disturbing effect upon the law of succession.²³

IV. THE EFFECT OF THE ORDINANCE UPON THE LAW OF TESTATE AND INTESTATE SUCCESSION

It was in this latter connection that the separation of the ecclesiastical jurisdiction from that of the common-law courts had its most profound effect, exerting an influence upon the future procedural and substantive development of real and personal property in both England and America, insofar as they were affected by testaments of personalty and devises of realty, and insofar as they were affected by descent of real property or the distribution of personal property.²⁴

At this time, or shortly thereafter, the spiritual courts acquired jurisdiction over the probate of testaments, and in time, as a consequence thereof, control over the distribution of the decedent's personalty. Perhaps this development arose out of the church's claim of the dead man's last will which was connected with his last confession.²⁵ This claim extended to an assertion of jurisdiction to pronounce on the validity of wills, to their interpretation, as well as the regulation of "her creature the testamentary executor, whom she succeeded in placing alongside of the English heir."²⁶ From jurisdiction over the probate of testaments of personalty, it was only a step to claim jurisdiction over the succession of moveables, although the process by which this occurred remains obscure. It may have been the result of the belief that to die intestate was sinful, but in any event perhaps as a result of

²² 3 STREET, *FOUNDATIONS OF LEGAL LIABILITY*, c. VIII, *The Venue of Actions*, 90-95 (Northport, 1906).

²³ The jurisdiction of the Court of Chancery over the administration of the assets of decedents' estates was also a development which had its origin in the separation of the ecclesiastical and common-law courts under the Ordinance of William the Conqueror in 1072, as it created another system of courts which was to contest with the common law and ecclesiastical courts for jurisdiction over the dead man's property. REPPY AND TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS*, c. III, 145-159 (Chicago, 1928).

²⁴ REPPY AND TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS*, c. III, 101-102 (Chicago, 1928).

²⁵ PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW*, Pt. VI, c. II, 689 (4th ed., London, 1948).

²⁶ 1 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW*, Bk. I, c. IV, 107 (Cambridge, 1895).

this development the law regulating the distribution of personalty, both on its substantive and procedural side, began flowing down a separate and distinct channel from that of the law of realty; that is, what constituted the proper execution of a testament, as well as its probate, and how personalty should be distributed in case of intestacy, became entirely a problem of the canon law.

At the same time the common-law courts retained jurisdiction over freehold estates and, as an incident thereof, jurisdiction over devises of freehold estates. From this point, it is also clear that they exercised control over the descent of real property. Thereafter, the law of real property, insofar as it became the subject-matter of devises, on both the substantive and procedural law sides, began flowing down a separate and distinct channel from that of the law of personalty; that is, what constituted the proper execution of a will, as well as its probate, and how realty should descend in case of intestacy, became entirely a problem of the common law.

As a matter of actual practice, how was this worked out? The general rule of law is that the judgment of a court having exclusive jurisdiction over the subject-matter and the parties to an action is conclusive upon the same matter between the same parties when they appear incidentally in question in another court for a different purpose.²⁷ If the rule were otherwise there might be conflicting decisions upon the same subject-matter between the same parties, and thus the adjudication be subjected to interminable doubts, with the general rules of law as to the effect of a plea of *res judicata* completely overthrown. Such a decision was treated at common law as being in the nature of a proceeding *in rem*, necessarily conclusive upon the matter in controversy, and hence making for the safety and repose of society.

In this connection it should be kept in mind that under the ecclesiastical and later English law two kinds of probate were developed for the proof of testaments: probate in the common form, and probate in the solemn form.

In probate in the common form, an *ex parte* proceeding without notice to the next of kin, was obtained on production of the will, accompanied by the oath of the executor that he believed it to be the last testament of the deceased testator. If the instru-

²⁷ *Duchess of Kingston*, 11 Harg. St. Tr. 261, 20 How. St. Tr. 355 (1776).

ment was regular in form, this was sufficient, but if some irregularity developed, then the executor had to prove its due execution by affidavits. In either case, the judge then annexed his probate and seal to the testament, thus confirming the same.²⁸ After the Wills Act of 1837,²⁹ the allowance of probate in common form was upon affidavit of one or more witnesses to the will, making out its execution in conformity with the requirements of the Act.

Probate in solemn form is a proceeding upon notice to all the parties interested, with an opportunity to attend and be heard on the question of probate.³⁰ The judgment rendered in this form was conclusive evidence as to the validity of the testament and as to the title to the personalty thereby bequeathed.

Swinburn, in comparing the two forms of probate, says that in the common or vulgar form, those interested are not cited to be present; whereas, in the solemn form, they are cited, with the result that the executor, who proved the will in the common form in the absence of those legally interested, may be compelled to prove it again in solemn form. If, in the meantime the witnesses have died, the validity of the entire testament may be put in question; particularly if ten years have not elapsed to raise a presumption as to the observation of all solemnities in the probate. On the contrary, if the testament had been probated in solemn form, the executor could not be compelled to prove it again, and its validity could not be questioned, even though all the witnesses were dead.³¹

This was the situation when the Wills Act of 1540³² gave the right to devise land, thus raising the issue as to how a will should be probated. The common law and ecclesiastical courts having been permanently separated under the Ordinance of William the Conqueror (1072), the ecclesiastical courts, in theory, could not probate a will devising land, as they had no jurisdiction over succession to freehold estates. Indeed, the common-law courts frequently resorted to the writ of prohibition in order to prevent the

²⁸ REPPY AND TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS*, c. III, 112 (Chicago, 1928).

²⁹ 7 Wm. IV & 1 Vict. c. 26.

³⁰ For the procedural steps in the solemn form of probate, see REPPY AND TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS*, c. III, 112-113 (Chicago, 1928).

³¹ *Id.* at 113.

³² 32 Hen. VIII, c. 1.

ecclesiastical courts from hearing suits involving a devise of real estate.

This division of jurisdiction had to be met and it was met and solved, but only in a way which was to provoke endless controversy between the lay and spiritual courts. Let us suppose, after the separation of the common-law and ecclesiastical courts, that a testator executed a will in which he mingled the disposition of both real and personal property, and then died. As the will included personal property, it naturally had to be submitted to the ecclesiastical court for probate, as that court had jurisdiction over testaments. If a decree issued admitting the instrument to probate, a question arose as to what was its effect as to the title to the realty and personalty devised and bequeathed thereunder.

First, let us consider the effect of the probate of the instrument as to the personalty. In England it was held that the probate of a will, mingling the disposition of both real and personal property, was conclusive evidence as to validity of the instrument as a testament and as to the title to the personalty included therein, in the sense that the same question could not be re-examined or re-litigated in any other tribunal. The reason for this was that the decree of probate, being the judgment of a court of competent jurisdiction, having control over the subject-matter in controversy, and all parties, who had any interest for the purpose of contesting the validity of the instrument as a mode of transferring title to personalty, was conclusive between the parties involved. In short such decree was in the nature of a judgment in rem, so that if one of the parties in another action or suit, subsequently raised a question as to the title to the personal property, the decree of the ecclesiastical court could be pleaded in bar under the doctrine of *res judicata*, thus avoiding conflicting adjudications upon the same subject-matter between the same parties.

Second, the effect of the decree of the ecclesiastical court upon the validity of the will and the title to the realty devised thereunder may be seen in its proper perspective. The rule in England was that the decree of the ecclesiastical court admitting to probate an instrument disposing of both real and personal property, was not even evidence as to the title to the real estate.

The reason was that the ecclesiastical courts, by reason of the Ordinance of 1072, had no jurisdiction over freehold estates or over wills devising freehold estates, hence the probate of a will purporting to dispose of both kinds of property, was wholly inoperative and void, except as to the personal estate of the decedent. The validity of wills of real estate was solely cognizable by courts of common law in the ordinary forms of suit. Thus, title to the real estate included in the will could be disputed in a subsequent action of ejectment, which was the customary method of testing the validity of a will passing title to real property. It thus appears that the general rule stated at the beginning of this section that the judgment of a court having exclusive jurisdiction over the subject-matter and the parties to an action is conclusive and hence a bar to any subsequent relitigation of the same parties and involving the same subject-matter, had no application to the decree of probate involving a will of real estate, for the reason that the court had no jurisdiction over freehold estates and hence no jurisdiction over devises thereof.

V. THE SUBSTANTIVE AND PROCEDURAL LAW OF REALTY FLOWS DOWN A SEPARATE AND DISTINCT CHANNEL

A. *As to Wills.*—The absurdity of having a will involving the disposition of both real and personal property passed upon by different courts was pointed out by Lord Hardwicke, Chancellor, in the case of *Montgomery v. Clarke*.³³ He declared: "I have often thought it a very great absurdity, that a will which consists both of real and personal estate, notwithstanding it has been set aside at law for the insanity of the testator, shall still be litigated upon paper depositions only in the ecclesiastical court, because they have jurisdiction on account of the personal estate disposed of by it. I wish gentlemen of abilities would take this inconvenience and absurdity into their consideration, and find out a proper remedy by the assistance of the legislature. But as the law stands at present, it is not in the power of this court to interpose, so as to stop the proceedings in the ecclesiastical court." In view of

³³ 2 Atk. 379, 26 Eng. Rep. 629 (1742).

the absurd situation referred to, it may be well to trace the steps by which the law came to such a state.

1. *On the Substantive Law Side.*—After the separation of the common law and ecclesiastical courts, the law of wills went through a series of developments on its substantive side. *First* the right to make a will was abolished on the theory that a conveyance of real estate by will violated the common law rule requiring an open, notorious livery of seisin.³⁴ This decision was avoided by resort to the use, under which a testator, in contemplation of death, would convey his real property to one or more trustees, with instructions as to how it should be held and distributed. As the trustee acquired the legal title and the seisin, upon the death of the testator there was no transfer of the legal seisin, hence no violation of the common law rule³⁵ against a conveyance of real estate without open notorious livery of seisin. But this practice received a death blow with the enactment of the Statute of Uses³⁶ abolishing such use of the use. As a result, between 1535, the date of the statute and 1540, the date of the First Wills Act,³⁷ wills were entirely abolished in England, except as preserved by being executed under some local custom as, for example, the custom of gavelkind in London.

In 1540, however, the right to execute wills of real estate was restored, with the only formality in execution required being that the instrument must be in writing. Between 1540 and 1676 it was frequently observed that the revocation of a will should require as much solemnity as did the execution of a will, but still no action was taken. This was changed in 1675 as a result of the case of *Cole v. Mordaunt*.³⁸ An aged testator married a young woman, made a will, leaving a portion of his estate to her, with the remainder to charities, and then died. After his death the wife proved a revocation of the gifts to the charities by use of perjured testimony which, upon discovery, caused Lord Notting-

³⁴ 2 POLLOCK AND MATTLAND, HISTORY OF ENGLISH LAW, Bk. I, c. VI, § 3, 326-327 (Cambridge, 1895); See, REPPY AND TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS, c. I, 12 (Chicago, 1928).

³⁵ See REPPY AND TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS, c. I, 13-14 (Chicago, 1928).

³⁶ 27 Hen. VIII, c. 10 (1535).

³⁷ 27 Hen. VIII, c. 10 (1535).

³⁸ Stated in note to *Mathews v. Warner*, 4 Ves. Jr. 186, 31 Eng. Rep. 96 (1798).

ham to observe that he hoped to live to see the day when it would require as much formality to revoke as to execute a will. The following year, 1676, saw the enactment of the Statute of Frauds,³⁹ under which such requirement as to revocation came into operation. But more important, for our purposes, is the fact that the statute added to the formality of writing required for the execution of wills in the Wills Act of 1540, the additional requirements that the will should be signed by the testator, and attested by three or four credible witnesses in the testator's presence. Two questions arose under this statute, *one*, whether a signature of a testator, made out of the presence of the witnesses, could be cured by the later acknowledgement of his signature by the testator in the presence of the witnesses; *two*, whether a will not signed at the foot or end thereof was valid.

As to the first question, it was held that the failure of a testator to sign the will in the presence of the witnesses could be cured by an acknowledgement of his signature in their presence, a construction favorable to the common-law doctrine of freedom of alienation; as to the second, it was held in *Le Mayne v. Stanley*,⁴⁰ that even a signature in the commencement of the will satisfied the statutory requirement.

Thus, the substantive law requirements for the execution of a will, included a writing, a signature by the testator, and attestation by three or four credible witnesses in the presence of the testator, were widely divergent from those for testaments, there being no requirement as to formality in execution as to the latter. And this disparity between what constituted a will of realty and a testament of personalty, having begun in 1072, was still in effect in 1676, and was to continue until 1837, which covered over all a period of almost eight hundred years.

2. *On the Procedural Law Side.*—The law of wills on the procedural or probate side, also flowed down a separate channel from the law of testaments, after the Ordinance of 1072. If the decree of the ecclesiastical court was only *prima facie* evidence of such title, or no evidence at all, how was a will which disposed

³⁹ 29 Car. II, c. 3. On the origin and date of the statute, see article by Costigan, *The Date and Authority of the Statute of Frauds*, 26 HARV. L. REV. 329 (1913).

⁴⁰ 3 Lev. 1, 83 Eng. Rep. 545 (1681).

of real as well as personal property to be probated, or how was the title of a devisee thereunder to be made conclusive? The problem may be made clear by an hypothetical case. Suppose *T* dies leaving a will in which he devises Blackacre to *B*, and bequeaths his personalty to *C*. After the ecclesiastical court admitted the instrument to probate, *B*, in reliance thereon, attempts to take possession of Blackacre, but finds *H*, the heir of *T*, in possession. Holding that *B*'s decree of probate is no evidence, or at most, only prima facie evidence of title to real estate, as the ecclesiastical court had no jurisdiction over freehold estates, *H* refused to surrender possession to *B*. Accordingly, *B* was forced to institute an action of ejectment against the heir in which he alleged, among other allegations, title under the will. *H*'s denial brought title in issue and then at the trial *B* offered the will of *T* as evidence of his title. As title depended upon the validity of the will, *B* was required to prove its due execution in the same manner as a deed, due allowance being made for the difference in the nature of the two instruments and the formalities of execution. If the court accepted *B*'s proof, judgment was entered for *B*, execution on the judgment issued, and *B* now took possession of Blackacre under a judgment which was conclusive of the devisee's title. By this process a will of real estate was probated at common law,⁴¹ and this story explains why so many of the cases which a student studies in the casebooks on real property came up on an ejectment under a will. Both the lawyers and the litigants were probating the will, but both were equally unconscious that the necessity for the mode of procedure invoked therein was in any way connected with William's famous Ordinance.

B. *As to Descent.*—After the Ordinance under which the common-law courts retained jurisdiction over the procedural and substantive law of wills, it was inevitable that they should also continue to control the descent of freehold estates. It is probable that descent was an orderly development of the common law as developed in Saxon times. However this may be, the Conqueror, immediately after the Conquest, in a message of reas-

⁴¹ 1 THORPE'S ANC. INST. 413, 500; *Hensloe's Case*, 9 Co. 36, 37b, 77 Eng. Rep. 784 (1600); *Marriot v. Marriot*, 1 Str. 666, 93 Eng. Rep. 770 (1726); *Montgomery v. Clark*, 2 Atk. 379, 36 Eng. Rep. 628 (1762); *Habergam v. Vincent*, 2 Ves. Jr. 223, 39 Eng. Rep. 595 (1792).

surance to the nation, expressed the thought that "every child was to be his father's heir."⁴² Thus, it seems clear that by the end of Henry II's reign, (1146-1216), the common law of descent was assuming definite form, the general rule being that if the ancestor left an heir in the descending lineal scale, he and others standing in the same position, inherited. Precedence among the ancestor's descendants was, according to Pollock and Maitland, determined by six rules: "(1) A living descendant excludes his own descendants. (2) A dead descendant is represented by his own descendants. (3) Males exclude females of equal degree. (4) Among males of equal degree only the eldest inherits. (5) Females of equal degree inherit together as co-heiresses. (6) The rule that a dead descendant is represented by his descendants overrides the preference for the male sex, so that a grand-daughter by a dead eldest son will exclude a younger son."⁴³

From this general statement of principles, it is clear that the common law originally preferred descendants before all other kindred, and the doctrine of primogeniture had not taken undisputed control. But William's promise was destined to be broken as the feudal system inevitably brought changes in the law of inheritance. Forfeiture for treason under which the Crown secured the traitor's estate, and escheat of estates resulting from a tenant's felony, both made serious breaches in the established law of inheritance.

Moreover, the incidents of feudal tenure made it essential that the King's right thereto should not be split up upon the death of his tenant and hence natural justice—equal distribution among the heirs as tenants in common—was forced to yield to political expediency, with the result that primogeniture⁴⁴—inheritance by the eldest son—became the established rule, and as an incident thereof the doctrine of freedom of alienation became an essential and vital doctrine of the common law. Still another incident of this development was the necessity of revising the rules of descent

⁴² PLUCKNETT, A CONCISE HISTORY OF ENGLISH LAW, Pt. VI, c. I, 675 (4th ed., London, 1948).

⁴³ 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, Bk. II, c. VI, § 2, 258 (Cambridge, 1895).

⁴⁴ 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, Bk. II, c. VI, § 2, 260 (Cambridge, 1895).

On primogeniture in the United States, see article by Morris, *Primogeniture and Entailment of Estates in America*, 27 COL. L. REV. 24 (1927).

in the light of the new doctrine of primogeniture. Within the framework of the parentelic system,⁴⁵ the common-law courts by a long process of judicial decision, framed a new system for the descent of real estate, based partly on customary law and partly on the new exigencies developed by the growth of the feudal system. Ascendants were barred from taking, collaterals were permitted to inherit, the doctrine of representation gained recognition, heirs of the half-blood were excluded, and the rule was established that the heir could only inherit from an ancestor who died actually seized.

The law of descent, except as modified by later decision, was substantially in this state, when Sir Mathew Hale in the seventeenth century, undertook to state these rules in an organized system in what have come to be known as Hale's Canons of Descent.⁴⁶ This effort apparently exercised no great influence upon the development of descent except indirectly. In 1759, however, with Hale's Canons in mind and against the background of such further developments as had been revealed in the later de-

⁴⁵ For a full discussion of the parentelic scheme of descent, see 2 POLLOCK AND MATTLAND, *HISTORY OF ENGLISH LAW*, Bk. II, c. VI, § 2, 294-299 (Cambridge, 1895).

⁴⁶ These canons, seven in number, read as follows:

"FIRST, in descents, the law prefers the worthiest of the blood. . . .

"SECONDLY, the next of blood is preferred before the more remote, though equally or more remote. . . .

"THIRDLY, that all the descendants, from such a person as by the laws of England might have been heir to another, hold the same right by representation as that common root from whence they are derived. . . .

"FOURTHLY, that by the law of England, without a special custom to the contrary, the oldest son, or brother, or uncle excludes the younger; and the males in equal degree do not all inherit; but all the daughters, whether by the same or divers venters, do inherit together to the father; and all the sisters, by the same venter, do inherit to the brother.

"FIFTHLY, that the last actual seisin in any ancestor, makes him, as it were, the root of the descent, equally to many intents, as if he had been a purchaser; and, therefore, he that cannot, according to the rules of descents, derive his succession from him that was last actually seised, though he might have derived it from some precedent ancestor, shall not inherit. . . .

"SIXTHLY, that whosoever derives a title to any land must be of the same blood of the first purchaser. . . .

"SEVENTHLY, in all successions, as well as in the line descending, transversal or ascending, the line that is first derived from a male root has always the preference. See, 2 HALE, *HISTORY OF COMMON LAW*, 114 (5th ed., London, 1794).

"The numerical arrangement [of Hale's Canons of Descent] is different from the arrangement made by Blackstone, and the rules themselves are differently, and perhaps, less perfectly expressed. Their chief importance arises from the fact that they are sometimes referred to in the reported cases, and, therefore, necessary to be understood, in order to understand the decisions made." BINGHAM, *TREATISE ON THE LAWS OF DESCENTS*, c. VIII, § 2, 314 (Albany, 1870).

cisions at common law, Blackstone restated the Canons of Descent in such classical language and in such logical form that they gradually achieved almost as much weight as if they had been enacted by Parliament.⁴⁷

As thus developed in substantially final form these Canons of Descent revealed the following characteristics: Primogeniture dominated the scheme; inheritance lineally descended to the issue of the person who last died actually seized, while male issue were preferred to female; where the only heirs were female, they took equally; lineal descendants of any person deceased represented their ancestor, or took *per stirpes* and not *per capita*;

⁴⁷ Blackstone's Commentaries, also seven in number, read as follows:

"I. The first rule is, that inheritances shall lineally descend to the issue of the person last seized *in infinitum*; but shall never lineally ascend. . . .

II. A second general rule or canon is: that the male issue shall be admitted before the female. . . .

"But our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were most strictly retained. It only postpones them to males; for though daughters are excluded by sons, yet they succeed before any collateral relations; our law thus steering a middle course, between the absolute rejection of females, and the putting them on a footing with males.

"III. A third rule or canon of descent is this: That where there are two or more males, in equal degree, the eldest only shall inherit; but the females altogether. . . .

"IV. A fourth rule, or canon of descent, is this: That the lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

"Thus the child, grandchild, or great-grandchild (either male or female) of the eldest son succeeds before the youngest son, and so *in infinitum*. And these representatives shall take neither more or less, but just so much as their principals would have done. . . .

"This taking by representation is called succession *in stirpes*, according to the roots; since all branches inherit the same share that their root whom they represent, would have done. . . .

"V. A fifth rule is: That on failure of lineal descendants, or issue, of the person last seized, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules. . . .

"VI. A sixth rule or canon therefore is: That the collateral heir of the person last seized must be his next collateral kinsman, of the whole blood. . . .

"VII. The seventh and last rule or canon is: That in collateral inheritances the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near), unless the lands have, in fact, descended from a female." BLACKSTONE'S COMMENTARIES, c. II, 382-397 (3d ed., Chase, New York, 1890).

Blackstone's Canons of Descent, it is interesting to note, were published in the Province of New Jersey in 1764, which was prior in point of time to their appearance in England as a part of the famous Commentaries. See, CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE (Woodbridge, New Jersey, 1764).

collateral inheritance was valid, where such relations were of the blood of the first purchaser; only heirs of the whole blood could inherit; and in collateral inheritances the male stocks were to be preferred to the female, thus giving rise to the ancestral estate, which has created so much difficulty in our law of descent.⁴⁸

VI. THE PROCEDURAL AND SUBSTANTIVE LAW OF PERSONALTY FLOWS DOWN A SEPARATE AND DISTINCT CHANNEL

A. *As to Testaments.*—It is usually said that the power to dispose of personal property by testament was recognized during the Anglo-Saxon period.⁴⁹ In the sense that various forms of disposition, which were destined to develop into the modern testament, were being made, the assertion is true. But if by will, we mean a disposition which is revocable, ambulatory, or which creates a representative of the testator, the statement is not true,⁵⁰ and cannot be taken at face value. Indeed, little of a definite character is known concerning the extent of the testamentary power during this period and under what restrictions it could be exercised.⁵¹

Perhaps the earliest form of will was the *post obit gift*, which consisted of an "actual delivery of the goods to a trustee or executor, who undertook to distribute them after the owner's death in accordance with the latter's wishes."⁵² In other words, this was a gift after death, which, at a later date, became impossible as far

⁴⁸ *Den ex dem Delaplaine v. Jones & Searing*, 8 N.J.L. 340 (1826); *Cornell v. Child & Kent*, 170 App. Div. 240, 150 N.Y.S. 449 (1915).

⁴⁹ PAGE, *TREATISE ON THE LAW OF WILLS* § 19 (3d ed. Cincinnati, 1941-1942). 1 WILLIAMS, *TREATISE ON THE LAW OF EXECUTORS AND ADMINISTRATORS*, 1 (5th Amer. ed., Philadelphia, 1859); CROSWELL, *TREATISE ON THE LAW RELATING TO EXECUTORS AND ADMINISTRATORS*, 4 (Boston, 1889); BLACKSTONE, *COMMENTARIES*, c. II, 591 (3d ed., Chase, New York, 1890). This power was also said to include terms of years as well as goods and chattels. COKE UPON LITTLETON, 111b (1st Amer. from 16th European ed., by Francis Hargrave and Charles Butler, Philadelphia, 1812). But compare statement by Orrin K. McMurray, in article, *Liberty of Testation and Some Modern Limitations Thereon*, 14 ILL. L. REV. 100 (1919).

⁵⁰ 2 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW*, Bk. II, c. VI, § 3, 313 (Cambridge, 1895).

⁵¹ *Ibid.*

⁵² JENKS, *SHORT HISTORY OF ENGLISH LAW*, c. I, 61 (4th ed., London, 1934).

as land was concerned, because of the rule that there could be no gift without a livery of seisin.⁵³

During the last three hundred years of the Saxon period, another form of disposition, known as the "death-bed distribution," appears.⁵⁴ This consisted of a statement on the part of the dying man, his *verba novissima*, usually made to his confessor, directing what disposition should be made of his property. As these dispositions depended, for effectiveness, upon the power of the Church, some portion of the dying man's chattels were usually given to the Church for pious uses. It has been said that the effect of the whole transaction amounted to the appointment by the dying man of some person such as his confessor or a friend who would see to the distribution of his property after death, and that in this practice is to be found the germ from which has developed the modern executor.⁵⁵

These two institutions, the *post obit gift* and the *verba novissima* (death-bed distribution), unite, during the ninth, tenth and eleventh centuries to form the *cwīde* (statement), which seems to represent the final development of the will in Saxon times.⁵⁶ As thus developed, it was "exceedingly formless," it was written in the native tongue; it lacked the element of ambulatoriness; and Pollock and Maitland⁵⁷ have expressed a doubt as to whether it was of a truly testamentary character, in the sense of being revocable. They base their contention upon the following grounds: (1) That most of the wills of this period were made by the great men of the day; (2) That the consent of the King must be purchased by an heriot; (3) That the will had to be approved by the bishop; (4) Finally, that the will must be executed in duplicate or triplicate, so that one copy could be handed over to the monastery—the main donee. Page⁵⁸ contends that all this proves nothing; that in the natural course of selection, the wills

⁵³ 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, Bk. II, c. VI, § 3, 319 (Cambridge, 1895).

⁵⁴ 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, Bk. II, c. VI, § 3, 317 (Cambridge, 1895).

⁵⁵ 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, Bk. II, c. VI, § 3, 314 (Cambridge, 1895).

⁵⁶ 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, Bk. II, c. VI, § 3, 319 (Cambridge, 1895).

⁵⁷ 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, Bk. II, c. VI, § 3, 317, 318, 319 (Cambridge, 1895).

⁵⁸ PAGE, TREATISE ON THE LAW OF WILLS § 10 (3d ed. Cincinnati, 1941-42).

or testaments of great men, as opposed to men of lesser rank, would survive; *first*, because the wills of the great, as a result of their position in life, would be regarded as semi-public documents; *second*, because these men usually left something to the Church, which naturally took measures to preserve their wills in its archives. "In any event," he concludes, "we find some instruments which could not take effect until testator's death and which could be revoked at pleasure."⁵⁰

1. *On the Substantive Law Side.*—With the Norman Conquest, no sudden change took place. The development of the law of wills continued in much the same channels for a time. But with the establishment of the common-law courts, which, to protect the heir against gifts wrung from his ancestors on his death-bed, insisted that "a boundary must be maintained against ecclesiastical greed and the other-worldliness of dying men," and that there must be a "real delivery of real seisin," the power to dispose of land by the *post obit gift* disappeared altogether.⁶⁰ On the other hand, the separation of the ecclesiastical from the secular courts, already described, resulted in the introduction of the Roman influence, and gradually transformed the Saxon will of personalty into the modern testament, having the characteristics of ambulatoriness, in the sense of including after-acquired property, and of being revocable at any time before death.⁶¹ At one time during this transition period, the test as to whether a given disposition was an ordinary conveyance or a testament depended upon whether it appointed an executor, it being thought that a will without an executor was invalid, but this test soon disappeared.⁶² The Church, having perpetuated its control over the testament on the *substantive law side*, strenuously contended that it was the duty of every man to make a will in which the "dead's part" was to be left to pious uses. It was generally thought that to die intestate was to die unconfessed, hence it is not surprising to find Henry I [1100-1135] promising in his Charter⁶³ that if a

⁵⁰ *Ibid.*

⁶⁰ 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, Bk. II, c. VI, 327, 328 (Cambridge, 1895).

⁶¹ WALSH, OUTLINES OF THE HISTORY OF ENGLISH AND AMERICAN LAW § 86, 359 (New York, 1923); 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, Bk. II, c. VI, § 26, 334. (Cambridge, 1895).

⁶² 2 HOLDSWORTH, HISTORY OF ENGLISH LAW 420, 421 (4th ed., Boston, 1931).

⁶³ § 7. Reported in REPPY AND TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS, c. VI, 228 (Chicago, 1928).

man died suddenly and without opportunity to make a will, his chattels shall be administered by his friends and the Church. The existence of this attitude is confirmed by Bracton,⁶⁴ who states that in case of intestacy, the "dead's part" went to the Church.

During this period, as will appear later,⁶⁵ jurisdiction over the probate of wills was vested in the ecclesiastical courts, hence the formation of rules concerning the execution, revocation and interpretation of testaments, was influenced by the canon or by the civil law. Many of these rules, as thus formulated, were later to become a part of the common law.

Whether the power to dispose by testament of all of a man's personalty ever existed during Saxon times is not clear. But by the time of Glanville (A.D. 1178), it was well settled that the right to make testamentary disposition of personal property was restricted.⁶⁶ And Professor Walsh thinks that: "The inference is entirely reasonable that similar restrictions existed in Saxon times, though not in a fixed or definite form, or protected by a special writ as in the twelfth and thirteenth centuries."⁶⁷ Under these restrictions the wife and children received reasonable parts recoverable by the special writ of *de rationabili bonorum*.⁶⁸ Glanville seems to have recognized this limitation as an established rule of the common law, and it appears to have been so regarded even during the reign of Charles I (1649-1654). By Coke, it was regarded as a local custom, and the fact that the limitations disappeared after the reign of Charles I lends some support to this view.⁶⁹ In some localities, however, these restrictions were retained by special custom, until finally abolished by statutory enactment.⁷⁰

⁶⁴ Lib. II, c. 26.

⁶⁵ See REPPY AND TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS, c. III, 101 (Chicago, 1928).

⁶⁶ GLANVILLE, Lib. VII, c. 5 (London, 1673); BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, ff. 60b (London, 1569); 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 559 (4th ed. Boston, 1931); MAGNA CARTA, § 26 (1215).

⁶⁷ WALSH, OUTLINES OF THE HISTORY OF ENGLISH AND AMERICAN LAW § 86, 356 (New York, 1923).

⁶⁸ *Supra* note 66.

⁶⁹ GARDNER, HANDBOOK ON THE LAW OF WILLS, c. I, § 2, 9 (2d ed. St. Paul, 1916).

⁷⁰ 1 HOLDSWORTH, HISTORY OF ENGLISH LAW, c. VII, 552, 553 (4th ed. Boston, 1931) and notes; they were swept away in the province of York by the statute of 4 & 5 Wm. & Mary, c. 2 (1692), explained by 2 & 3 Anne, c. 5 (1703); in Wales by the statute of 7 & 8 Wm. III, c. 38 (1696); in London by the statute of 11 Geo. I, c. 18 (1724), thus making "liberty of testation a universal principle

This was the situation when the Wills Act of 1540⁷¹ became operative, requiring a will of realty to be in writing, but making no provision as to formality in execution for testaments. Hence, thereafter an oral or nuncupative testament, if proved by the testimony of two witnesses, was effective to pass personalty as well as a written will. The danger of an oral testament without any restrictions as to formality was recognized, but nothing was done until, as a result of the famous case of *Cole v. Mordaunt*,⁷² the Statute of Frauds⁷³ was enacted in 1676, certain sections of which, it is supposed, were designed to meet the dangers emphasized by that case. Although the statute related primarily to wills, it contained important provisions concerning testaments. During the period before the Statute of Frauds, any person was free to make a valid oral declaration of his testamentary wishes, provided such person was *in extremis*. After the statute, the verbal will remained, but it was now subject to severe restrictions, as to the size of the estate which could be disposed of and the formalities required in method of proof. The statute provided that a nuncupative will, to be valid, must be proved by the oath of three witnesses present at the making thereof, who, at the testator's request, did bear witness that such was his will. It must also have appeared that the will was made during the testator's last sickness,⁷⁴ in his own habitation or dwelling or where he had

in English law." And even these statutes applied only to the restrictions upon the testamentary power; the old rules as to intestate succession remained in effect in these localities until abolished by the statute of 19 & 20 Vict., c. 94 (1856).

⁷¹ 32 Hen. VIII, c. 1.

⁷² Stated in note to *Matthews v. Warner*, 4 Ves. Jr. 186, 31 Eng. Rep. 96 (1798).

⁷³ 29 Car. II, c. 3.

⁷⁴ Concerning the term "last sickness," ROOD, A TREATISE ON THE LAW OF WILLS § 234 (2d ed. Chicago, 1926), says: "In the leading case of *Prince v. Hazelton* [20 Johns (N.Y.) 502, 11 Am. Dec. 307 (1822)], Chancellor Kent argued, and was sustained by the court in holding, that in view of the opportunities for fraud in making oral wills, the term "last sickness" in the statute must be construed to include only the last hours of the sickness; that the last sickness is only when the person is *in extremis*. Other courts have generally followed this decision, holding that nuncupative wills can be sustained only when made from necessity, or fear that consciousness might not remain long enough to make a written will. It is no objection to the nuncupative will that the testator was deluded by the hope of recovery till it was too late to make a written will, though warned by his physician. On the other hand, it has been held that the will is not bad because the testator did live long enough after the nuncupation to have made a will in writing, and was not in immediate fear of death." [*Harington v. Steeles*, 82 Ill. 50, 25 Am. Rep. 290 (1876); *Miller's Estate*, 47 Wash. 253, 91 P. 967, 13 L.R.A. (N.S.) 1092, 14 Ann. Cas. 1163, 125 Am. St. Rep. 904 (1907)].

previously been resident for ten days, except where such person was surprised or taken sick, being from his home, and died before returning to his dwelling.⁷⁵ The act further provided that no evidence could be received six months after the making of the will, for purposes of proving the same, unless the said testimony had been committed to writing within six days after the execution of the will;⁷⁶ and that no will in writing concerning personalty could be revoked by an oral will, except the same be in the life of the testator committed to writing, read to the testator, allowed by him, and proved to be so done by at least three witnesses.⁷⁷ But aside from the requirement of writing, no additional formalities in the execution of oral wills were necessary. Thus, for example, a testament was deemed to be valid if it expressed the testator's wishes and was reduced to writing during his lifetime, even though unsigned.⁷⁸

Three important classes of testators were excluded from the application of the rules concerning the validity of an oral will: (1) Persons disposing of estates not in excess of £30 in value;⁷⁹ (2) Mariners at sea;⁸⁰ (3) Soldiers in actual military service.⁸¹ The persons covered by these exceptions could still make oral wills subject to the rules of law as they existed prior to 1676; and it was still possible for all persons in their last sickness to make nuncupative wills, provided they complied with the requirements of the statute. Obviously, the new requirements had no bearing upon the excepted classes. Except for a statute enacted in 1705,⁸² which provided that all witnesses who, under the laws and customs of the realm, were competent in an action of law, should be deemed good witnesses to prove any nuncupative will, or anything relating thereto, the law remained in this state until 1837.

Having observed that the separation of the ecclesiastical from the secular courts had changed the Saxon will of personalty into the modern testament, we may now take up the consideration of

⁷⁵ 29 Car. II, c. 3, § 19 (1676).

⁷⁶ *Id.* § 20.

⁷⁷ *Id.* § 22.

⁷⁸ PAGE, TREATISE ON THE LAW OF WILLS § 232 (3d ed. Cincinnati, 1941-42).

⁷⁹ 29 Car. II, c. 3, § 19 (1676).

⁸⁰ *Id.* § 23.

⁸¹ *Ibid.*

⁸² 4 Anne, c. 16, § 14.

the effect of this development on the procedural or probate side of testaments.

2. *On the Procedural Law Side.*—Among the early lawyers there seems to have been a notion that during the Anglo-Saxon period the grant of probate and administration belonged to the temporal courts.⁸³ This may have been true regarding administration, but as to probate no substantial evidence has been adduced.⁸⁴ Of course, "If there had been such a thing as probate before the Norman Conquest, it would not have come before the ecclesiastical courts, for there were none then."⁸⁵ Holdsworth declared that neither "the civil nor the canon law sanctioned it,"⁸⁶ and Pollock and Maitland "doubt whether any such procedure as that which we call probate of a will was known in England before the time when jurisdiction over testaments had been conceded to the church."⁸⁷

Just when the ecclesiastical courts acquired jurisdiction to grant probate is not definitely known. It did not exist during the twelfth century;⁸⁸ it was fully established by the beginning of the fourteenth century.⁸⁹ Selden, in speaking of the origin of probate, declares: "I could never see an express probate in any particular case earlier than about Henry III."⁹⁰ By the reign of Henry III (1154-1189), the Church courts, as an incident to their control over matters of administration, had acquired jurisdiction over cases involving wills, hence it may be surmised that jurisdiction

⁸³ Hensloe's Case, 9 Co. 36, 37b, 77 Eng. Rep. 784 (1600); Y.B. 2 Hen. VIII, § 12; 1 THORPE, ANCIENT LAWS AND INSTITUTES OF ENGLAND, 413, 500 (London, 1840); SELDEN, TRACTS: IV. *Of the Disposition or Administration of Intestate's Goods*, c. I (London, 1683).

⁸⁴ SELDEN, TRACTS, c. III, op. cit. p. 1672; 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 341 (2d ed. Cambridge, 1911); Dyke v. Walford, 5 Moo. P. C. 434 (1846).

⁸⁵ PAGE, TREATISE ON THE LAW OF WILLS c. I, § 521 (3d ed., Cincinnati, 1941-1942).

⁸⁶ HOLDSWORTH, HISTORY OF ENGLISH LAW 625 (3d ed. Boston, 1922).

⁸⁷ HISTORY OF ENGLISH LAW 339 (Cambridge, 1895).

⁸⁸ 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 625 (3d ed. Boston, 1922).

⁸⁹ GLANVILLE, Lib. VII, c. 8 (London, 1673); Coote, PRACTICE OF THE ECCLESIASTICAL COURTS 21-58 (London, 1847).

⁹⁰ SELDEN, TRACTS: III. *Of the Origin of the Ecclesiastical Jurisdiction of Testaments*, c. VI (London, 1683); but compare the statement of 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 341 (2d ed., Cambridge, 1911): "In England we do not see it (probate) until the thirteenth century has dawned, and by that time testamentary jurisdiction belongs, and belongs exclusively, to the spiritual courts."

over the granting of probate was but a step away.⁹¹ Having jurisdiction over administration, it seemed logical that the ecclesiastical courts should also acquire a right to investigate any circumstances which might deprive them of the benefit of administration, such as a testament, alleged to have been executed by the person deceased.⁹² This, of course, called for proof that the testament had been executed, published and attested as the law required, and that the testator possessed a sound and disposing mind at the time. If such proof were forthcoming, the next step was to grant probate, which consisted of a certificate by an authorized court that proof of compliance with the law had been made.⁹³ Strenuous objection to the assumption of such control was raised by some of the more powerful overlords, who insisted that the wills of their tenants should be probated in the local courts. Holdsworth suggests that this may have been a "survival from the days when probate in the technical sense being unknown, the protection of the lord was sought for a will;" though in some cases it may, as Professor Maitland suggests, have originated in later grants from a Pope.⁹⁴ By the end of the fourteenth century, the step had been definitely taken,⁹⁵ though many elementary questions in the law of probate remained to be answered, a fact which tended to show that the right of granting probate was of somewhat recent origin.⁹⁶

The right of the ecclesiastical courts to grant probate, once established, remained in their hands for a period of over four hundred years, subject, of course, to various minor statutory changes. The first of these statutory interferences came as early as 1357. In that year, complaints of overcharging by the ecclesiastical courts for the probate of wills, led to a statutory warning by the King, of the Archbishop of Canterbury, as well as all other bishops, that they should amend the law of their own accord, or the King would cause his justices to inquire of "such

⁹¹ 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 625 (3d ed. Boston, 1922).

⁹² *Ibid.*

⁹³ As to the procedure in probating a testament, see REPPY AND TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS 112 (Chicago, 1928).

⁹⁴ 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 625 (3d ed. Boston, 1922).

⁹⁵ GLANVILLE, Lib. VII, c. 8 (London, 1673).

⁹⁶ 2 POLLOCK AND MATLAND, HISTORY OF ENGLISH LAW 362 (2d ed. Cambridge, 1911).

oppressions and exactions, to hear them and determine them as well at the King's suit, as at the suit of the party as in old time hath been used."⁹⁷ Indeed, this warning was contained in the same statute of 1357 which took the actual administration out of their hands. But the warning went unheeded; the avarice and greed of the Church officials overcame prudence, so that in 1416, or just fifty-nine years later, the matter again became the subject of statutory regulation.⁹⁸ The statute provided that no ordinary should take for probate of any testament, or for anything appertaining thereto, "no more than was accustomed and used in this part in the time of the said Edward the Third, upon pain to yield him that feeleth him grieved the treble so received, if he will sue by the course of the law, so that all manner of executors shall yield their accounts to the ordinaries, wholly of the testator's goods." This act remained in operation for but one year, as the ordinaries promised to reform and amend the oppressions and exactions. The promise was not kept; indeed, the oppression was augmented, so that Parliament was forced to intervene once again. The statute⁹⁹ enacted on this occasion regulated the fees to be demanded by the ecclesiastical courts in granting probate and administration, and also prescribed severe pains and penalties for any violation of such regulations. It provided that "nothing should be taken for the probate of a will, and making inventories, where the goods do not exceed £5, except 6d. to the clerk; where they do not exceed £40, not more than 3s. 6d.; and where they exceed that, 5s."¹⁰⁰

The next change was made by the Statute of Frauds,¹⁰¹ in connection with the probate of nuncupative testaments. The statute provided that six months after the speaking of the pretended testamentary words, no testimony should be received to prove any nuncupative will, except where such testimony had been committed to writing within six days after the execution of such will; that probate of such testaments should not be granted until at least fourteen days after the decease of the testator, nor could proof of such a will be made without notice to the widow

⁹⁷ 31 Edw. III, Stat. I, c. 4 (1357).

⁹⁸ 3 Hen. V, c. 8.

⁹⁹ 21 Hen. VIII, c. 5 (1529).

¹⁰⁰ 4 REEVES, HISTORY OF ENGLISH LAW, c. 28, 304 (Finlason ed., Philadelphia, 1880).

¹⁰¹ 29 Car. II, c. 3 (1676).

or next of kin, to the end that they might contest the probate.¹⁰² Otherwise, jurisdiction over the grant of probate of wills concerning personal estate was to remain in the ecclesiastical courts as of yore.¹⁰³ The alterations thus introduced by the Statute of Frauds concerning nuncupative testaments were made perpetual by the Statute of 1 Jac. II, cap. 17, sec. 5 [1685-1688].

In 1705, came an act¹⁰⁴ designed to facilitate the granting of probate of wills of persons dying intestate, having monies or wages due for work done in the yards and docks of England. It was enacted that the power of granting probate of the wills of such persons should be in the ordinary of the diocese, where such person or persons should die, and that the "salary, wages, or pay due to such person or persons from the Queen's Majesty, her heirs, or successors, for work done in any of the yards or docks, shall not be taken or deemed to be Bona notabilia, whereby to found the jurisdiction of the prerogative court."¹⁰⁵

The next statute, enacted in 1798,¹⁰⁶ provided for the administration of the assets of deceased persons where the executor to whom probate had been granted was out of the realm. It also provided that when an infant was made sole executor, administration with the will annexed should be granted to the guardian of such infant, until such infant should reach his majority, at which time probate of the will was to be granted to him.¹⁰⁷ But in the meantime, the person to whom administration should be granted was to have the same powers vested in him as an administrator by virtue of an administration granted to him *durante minore etate* of the next of kin.¹⁰⁸

B. *As to Distribution.*—Of the law of intestate succession of chattels during the Saxon period, we have no real record.¹⁰⁹ What knowledge we have is the result of certain inferences which have been drawn from the state of the law as found in the early

¹⁰² *Id.* secs. 20, 21.

¹⁰³ *Id.* sec. 24.

¹⁰⁴ 4 Anne c. 16.

¹⁰⁵ *Id.* sec. 26.

¹⁰⁶ 38 Geo. III, c. 87.

¹⁰⁷ *Id.* sec. 6.

¹⁰⁸ *Id.* sec. 7.

¹⁰⁹ 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 240 (2d ed. Cambridge, 1911).

part of the Norman era.¹¹⁰ Thus, we know that the power of testamentary disposition was subject to certain restrictions on alienation in favor of heirs. Indeed, one writer¹¹¹ suggests that the law of inheritance may have grown out of the restriction on wills, the exact character of which does not definitely appear until shortly after the Conquest.¹¹²

By the time of Glanville (A.D. 1178), it was settled that the power of bequeathing personal property by testament had certain limits, which were due to a fairly well defined scheme of intestate succession.¹¹³ These limitations have been thus described:

If a man had a wife and children, he could dispose by will of one-third of his personal property. At his death his widow took one of the remaining thirds, his children the other. If he had children, but no wife, or a wife and no children, he could dispose of one-half of his personal property, the widow or children taking the other half. The shares of the wife and children were called their 'reasonable parts' and the writ *rationabili parte bonorum* lay to recover them, it being maintainable against executors, founded upon a complaint that they unjustly detained from the plaintiff the reasonable parts of the goods and chattels which were of the deceased and refused to deliver the same.¹¹⁴

Most of the restrictions upon the right of intestate succession to chattels were removed during the fourteenth century, except in certain localities where they were continued by local custom.¹¹⁵ Thus, if a man died without a testament, his chattels were distributed according to the law of intestate succession,¹¹⁶ which had continued from Saxon times, and which, as an incident of the ecclesiastical court's control over probate, had also fallen within

¹¹⁰ WALSH, OUTLINES OF THE HISTORY OF ENGLISH AND AMERICAN LAW c. XV, sec. 4, 356 (New York, 1923).

¹¹¹ *Id.* at 361.

¹¹² 7 GLANVILLE, c. 5 (London, 1673); BRACTON, DE LEGIBUS ET CONSUETUNIBUS ANGLAE, ff. 60b (London, 1569); 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 559 (4th ed., Boston, 1931); MAGNA CARTA, sec. 26 (1215).

¹¹³ *Ibid.*

¹¹⁴ GARDNER, HANDBOOK ON THE LAW OF WILLS, c. I, sec. 2, 9 (2d ed., St. Paul, 1916).

¹¹⁵ WALSH, OUTLINES OF THE HISTORY OF ENGLISH AND AMERICAN LAW 361 (New York, 1923); 2 HOLDSWORTH, HISTORY OF ENGLISH LAW 436, 437 and notes (Boston, 1927); see also "History of the Law of Wills and Testaments" in REPPY AND TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS, 8, n. 54 (Chicago, 1928).

¹¹⁶ In 1856 uniformity in the law of intestate succession to chattels was established throughout England by the Statute of 19 & 20 Vict. c. 94.

that court's jurisdiction. Thus, where no testament appeared upon the death of a decedent, the Ordinary took control of the disposal of the personal estate, being bound only in good conscience to pay the debts of the intestate. By the Statute of Westminster II (1285)¹¹⁷ the Ordinary was subjected to the suits of creditors as were executors. By a statute enacted in 1357,¹¹⁸ the ecclesiastical courts were required to grant administration to the nearest and most lawful friends of the deceased, and this was the origin of administrators, who were thus placed by this statute on the same footing as executors. In spite of these provisions the ecclesiastical courts continued to exercise jurisdiction over administration, including the distribution of the surplus of the personal estate accruing to the kindred of the intestate according to the rules of the common law. This practice was tolerated as the Ordinaries, in the bonds taken by the administrators to account with them, usually included a provision that the surplus upon such accounting should be distributed as the Ordinary should direct. In time, this matter came to the attention of the common-law courts and they took the view that the bond of the administrator was of no avail and that the Ordinary was not compellable to make distribution. In consequence, when the ecclesiastical courts attempted to compel a distribution, a writ of prohibition issued. And while affairs were in this state, in an effort to end the contention between the common law and ecclesiastical courts, to enlarge and confirm their jurisdiction over intestate personal estates, the Civilians, in 1670 succeeded in having enacted the Statute of Distributions.¹¹⁹

¹¹⁷ 13 Edw. I, c. 19.

¹¹⁸ 31 Edw. III, c. 11.

¹¹⁹ 31 Edw. III, c. 11. In this connection, Plucknett in his distinguished treatise on *LEGISLATION OF EDWARD I*, c. I, 9-10 (Oxford, 1949), made the following observation:

"One of the most striking examples [of legislation] is to be seen in the position of executors. In Maitland's words, 'a change as momentous as any that a statute could make, was made without statute and very quietly' when for the first time the courts of Edward I gave actions of debt for and against executors. This step was of the utmost gravity. It abruptly closed the development of the English heir along the lines of the Roman *haeres*. By recognizing the executor as an institution of English law for the purpose of dealing with the decedent's chattels although preserving the descent of land to the heir, it cut our law of property permanently into two separate portions, and so it has remained until the present century."

¹²⁰ This statute was adopted in Virginia in 1705, 3 Hen. St. L. 371; continued in the Revised Laws of 1748, 5 Hen. St. L. 444; and remained in full force until the Revision of 1785 went into effect. *Davis v. Rowe*, 6 Rand. (Va.) 355 (1828). The Statute of Distributions provided:

"It is enacted that the surplusage of intestates' estates (except of *femmes*-

Under this statute, which was borrowed from the Civil Law, a scheme for the distribution of personal property was evolved or took final shape, the provisions of which stood in striking contrast to the common-law canons of descent. Primogeniture was abandoned in favor of the heirs or distributees taking equally as tenants in common; males were no longer preferred over females; inheritance was no longer limited to the blood of the first purchase; the half-blood were not to be excluded; and property was permitted to lineally ascend as well as descend,¹²⁰ and among collaterals and ascendants, the gradual scheme of distribution, as opposed to the parentelic scheme of descent, which prevailed in the inheritance of real property, prevailed.¹²¹

VII. THE REUNION OF THE LAW OF WILLS AND TESTAMENTS IN ENGLAND

A. *On the Substantive Law Side.*—As previously observed, at the time the Ordinance of 1072 was put into operation the common-law courts acquired jurisdiction over devises of real estate,

covert, which are left as at common law), shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner:

"One-third shall go to the widow of the intestate, and the residue in equal proportions to his children, or, if dead, to their representatives; that is, their lineal descendants: if there are no children or legal representatives subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives; if no widow, the whole shall go to the children: if neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives: but no representatives are admitted, among collaterals, farther than the children of the intestate's brothers and sisters. The next of kindred, here referred to, are to be investigated by the same rules of consanguinity, as those who are entitled to letters of administration; of whom we have sufficiently spoken. And therefore by this statute the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate and without wife or issue: in exclusion of the other sons and daughters, the brothers and sisters of the deceased.

"And so the law still remains with respect to the father; but by statute 1 Jac. II, Cap. 17 [1685], if the father be dead, and any of the children die intestate without wife or issue, in the lifetime of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions." 22 & 23 Car. II, Cap. 10 [1670].

¹²⁰ Speaking of the liberality of the Statute, in *Edwards v. Freeman*, 2 P. Wms. 441, 443, 24 Eng. Rep. 803, 806 (1724), Raymond, Ld.C.J., said:

"The Statute of Distributions does not break into any settlement that has been made by the father; it only meddles with what is left undisposed of by him, and of that only, makes such a Will for the intestate, as a father, free from the partiality of affections, would himself make; and this I may call a Parliamentary Will. The intention of making the children equal, goes through the whole Act."

¹²¹ REPPY AND TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS*, c. II, 93 (Chicago, 1928).

and as an incident thereof, over descent, if indeed, that power was not already in their hands. In this state of affairs the first substantive formality required for the execution of wills, that of writing, was laid down in the Wills Act of 1540,¹²² carried forward by the Bill Concerning the Explanation of Wills,¹²³ with additional formalities added by the Statute of Frauds.¹²⁴ In none of these statutes, proof aside, were any formalities in execution of testaments required. This was the situation when the Wills Act of 1837¹²⁵ was enacted. The phrase "no will," as used in that statute, included both wills and testaments. Hence, the requirements of the Wills Act of 1540,¹²⁶ the Statute of Frauds,¹²⁷ together with the additional formalities in execution required by the new Act, now were required for both wills and testaments. Under the new Act, the decisional ruling permitting the testator to make good by acknowledging a signature made out of the presence of the witnesses, took statutory form, the dispute as to the position of the testator's signature was resolved by requiring it to be at the foot or end of the will, the number of attesting witnesses was reduced, and the attestation of each witness was to be in the presence of the others. Now, for purposes of bar examinations, the student is usually told by his instructor, that the significance of the statute consists in the fact that it laid down the same formalities in execution for both wills and testaments. This is true, but it should be pointed out that a much deeper significance lies in the fact, that after a period of almost eight hundred years in which the law as to real property insofar as it was the subject-matter of a will, had been flowing down a separate and distinct channel from the law of personalty, there was a *reunion of the law* of wills and testaments on the substantive law side.

On the procedural side, the separation still continued, and it still remained true that the only mode of probating a will of real estate was by bringing an action of ejectment, as the old rule that the decree of the ecclesiastical court admitting to probate a

¹²² 32 Hen. VIII, c. 1, as modified by the Statute of Wills of 1542, 34 & 35 Hen. VIII, c. 5.

¹²³ 34 & 35 Hen. VIII, c. 5 (1542-1543).

¹²⁴ 29 Car. II, c. 3 (1676).

¹²⁵ 7 Wm. IV & 1 Vict. c. 26.

¹²⁶ *Supra* note 122.

¹²⁷ *Supra* note 124.

will including both real and personal property was only prima facie evidence as to title to personalty.

B. *On the Procedural Law Side.*—The ecclesiastical courts, as a result of William's Ordinance acquired jurisdiction over the probate of testaments of personal property, and, as an incident thereof, control of the distribution of the dead man's personalty if he died intestate. As testaments were not infrequently included in wills disposing of realty, which were subject to probate in the ecclesiastical court, a question naturally arose as to the validity of the decree of probate on title to realty included therein. As the ecclesiastical court had no jurisdiction over freehold estates, its decree was only prima facie evidence as to title to real estate, although conclusive as to personalty. This forced the devisee under a will to resort to the action of ejectment previously described as a method of probating a will and conclusively establishing his title to the real estate involved. This situation continued until the enactment of the Court of Probate Act of 1857.¹²⁸ Under this act jurisdiction of the ecclesiastical courts and all other courts of probate, was abolished, and the power, both as to wills and testaments, was vested in a new court called the Court of Probate, whose decree became conclusive evidence as to title as to both real and personal property, when mingled together in a single instrument of disposition. Thus, at last, after a period of many centuries, there was a reunion of the law of wills and testaments on the probate or procedural side.¹²⁹

C. *As to Descent and Distribution.*—The rules of descent as enumerated by Blackstone¹³⁰ and the scheme of distribution as formulated in the Statute of Distributions,¹³¹ remained in substantially the same form until 1833, at which time the Inheritance Act¹³² worked a tremendous change in the system of inheritance as developed at common law, finally giving ground to the equalitarian doctrines of the common law as illustrated by the provisions of the Statute of Distributions,¹³³ the canon law and the statute

¹²⁸ 20 & 21 Vict. c. 77.

¹²⁹ Supreme Court of Judicature Act of 1925, 15 & 16 Geo. V, c. 19.

¹³⁰ 3 & 4 Wm. IV, c. 106.

¹³¹ 22 & 23 Car. II, c. 10 (1670).

¹³² 3 & 4 Wm. IV, c. 106, 73 Stat. at Large 1002.

¹³³ 22 & 23 Car. II, c. 10 (1670).

both being the direct result of the separation of the ecclesiastical courts under the Ordinance of 1072.¹³⁴ In 1856, a second statute¹³⁵ designed to bring about nationwide uniformity in the distribution of personal estates of persons dying intestate, was enacted. It abolished the customary rules as to intestate succession, as handed down from Saxon times; in the city of London, the Provinces of York and in Wales. These changes were carried forward by the Intestate's Estates Act of 1890,¹³⁶ which was followed by the Law of Property Act of 1922¹³⁷ and the Administration of Estates Act of 1925,¹³⁸ under which the distinctions between real and personal property, as far as the devolution of property is concerned, were abolished. In short, there was, under these statutes, a reunion of the law of real and personal property on the devolution side, the question being no longer who takes the realty by descent or who takes the personalty by distribution, but who inherits the intestate's property, without regard to its character.

VIII. THE STATUS OF THE LAW OF SUCCESSION IN ENGLAND AT THE TIME IT WAS ADOPTED IN THE AMERICAN COLONIES

But at the time we adopted our law of succession from England—just prior to, during, or shortly after the American Revolution—the reunion of the law of wills and testaments on both the substantive and procedural sides was still far in the distance—1837 and 1858 respectively—while the reunion of the law of descent of realty and the distribution of personalty, which was partially achieved under the Inheritance Act of 1833,¹³⁹ was not to be consummated until the Administration of Estates Act¹⁴⁰ was enacted in 1922.

In substantially this form the English law of succession, both substantive and procedural, became law in the colonies. Thus, we find that in the several colonies the power to make testamen-

¹³⁴ Reported in REPPY AND TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS*, c. VI, 278 (Chicago, 1928).

¹³⁵ 19 & 20 Vict. c. 94.

¹³⁶ 53 & 54 Vict. c. 29.

¹³⁷ 12 & 13 Geo. V, c. 16.

¹³⁸ 15 Geo. v, c. 23.

¹³⁹ 3 & 4 Wm. IV, c. 106.

¹⁴⁰ 15 Geo. V, c. 23.

tary disposition of both real and personal property existed almost from the beginning. In a New Jersey case, decided in 1839, the court declared:

The Statute of Wills [32 Hen. VIII, c. 1 (1540)] was never formally enacted in this state; nevertheless the power of disposing of real estate by will always existed, and has been exercised from the earliest period of our colonial government. The Act of March 17, 1714, as its title indicates, was an act confirming wills then made and thereafter to be made, rather than an act prescribing new rules and ceremonies to be observed in making wills.¹⁴¹

It is clear, therefore, that the earliest colonists on the Atlantic seaboard brought with them the law of succession which, having been modified by the Wills Act of 1540,¹⁴² recognized the right to make a will of realty and have the title of the devisee thereunder made conclusive in an action of ejectment and the right to make a testament of personalty and have the title thereunder made conclusive by a decree of probate issued by the ecclesiastical court. It is equally clear that the colonists brought with them two systems of intestate succession—the common-law canons of descent founded on the feudal system, disregarding natural affection and natural justice—and the Statute of Distribution, borrowed from the Civil Law, under which personalty was distributed according to the presumed intent of the intestate, and suited, by its invocation of the quality of partition, to the genius of our infant government. These rights were recognized in New York as early as 1629 in the Charter of Freedoms and Exemptions,¹⁴³ confirmed as an incident of socage tenure in 1664 under the Duke's Laws,¹⁴⁴ and in the Act of October 22, 1644, which provided that "all persons of the age of twenty-one years might devise their lands."¹⁴⁵ The Statute of Frauds,¹⁴⁶ enacted in England in 1676, provided that wills were to be in writing, signed by the testator or by his direction, and attested in his presence by three or four credible witnesses. It seems to have been extended

¹⁴¹ *Mickle v. Matlack*, 17 N.J.L. 86, 93 (1839).

¹⁴² 32 Hen. VIII, c. 1.

¹⁴³ FOWLER, HISTORY OF REAL PROPERTY LAW IN NEW YORK, c. I, 7 (New York, 1895).

¹⁴⁴ *Id.* at 18.

¹⁴⁵ *Ibid.*

¹⁴⁶ 29 Car. II, c. 3.

to the Province of New York,¹⁴⁷ and so also the act further regulating wills in the English plantations must have been in effect prior to Independence.¹⁴⁸ If this be true, the law as to devises of real estate in New York was substantially the same as in England, requiring the same formalities in execution, with the legal title of the devisee subject to probate by action of ejectment in the same manner as in England, as the decree of the probate court, mingling real and personal property was, as in England, only *prima facie* evidence as to title to realty.

Coming to the subject of descent, according to Fowler, with the termination of hostilities at the close of the Revolution, the New York Legislature in the year 1782,¹⁴⁹ passed the first of a series of acts affecting real property. He declared:

This act converted estates tail into estates in fee simple absolute; it abolished primogeniture¹⁵⁰ as a rule of descents, and made real estate partible inheritance, in which all the issue of equal degree shared alike, and in default of issues the estates went in equal shares *per stirpes* to the next of blood of the last owner. Until the passage of this act the canons of descents had been wholly regulated in New York by the English law.¹⁵¹

The new law of descent thus perpetuated in 1782 was carried on down, and a fair picture of its character and scope may be seen in Kent's *Canons of Descent*,¹⁵² which appeared in 1835. The law

¹⁴⁷ FOWLER, HISTORY OF REAL PROPERTY LAW IN NEW YORK, c. IV, 73 (New York, 1895).

¹⁴⁸ 25 Geo. II, c. 6 (1752).

¹⁴⁹ N.Y.L. 1782, Sess. 6, c. 2, revised in 1786, 1 Jones & Varick, 245. See, also, Jackson *ex dem* v. Van Zandt, 12 Johns. 169 (1815).

¹⁵⁰ "In a few of the colonies the doctrine of primogeniture gained a temporary recognition. It existed in Rhode Island until the year 1770; in New Jersey, New York, Georgia and a few other states, until the revolution; in Maryland as late as 1815. In New Jersey the rule was modified by the Descent Act of 1780, under which the eldest son was given a double portion of the estate. A similar state of affairs existed in Massachusetts, Connecticut and Delaware. Under the Descent Act of 1817 the last vestige of primogeniture was eliminated in New Jersey, except in the case of a natural trust, in which case the estate descended to the eldest son, according to the law of primogeniture, such estates not being within the purview of the New Jersey statutes; and also except in the case of an estate tail, until changed by the Descent Act of 1820." REPPY AND TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS, c. II, 81 (Chicago, 1928).

¹⁵¹ FOWLER, HISTORY OF REAL PROPERTY LAW IN NEW YORK, c. IV, 73 (New York, 1895).

¹⁵² These canons, eight in number, read as follows:

"I. The first rule of inheritance is, that if a person owning real estate dies seized, or as owner, without devising the same. The estate shall descend to his

of descent as set forth by Kent in general followed the scheme of inheritance as outlined by Hale and Blackstone, subject to statutory and decisional changes in new cases, and to the equalitarian influence of the Statute of Distributions. This influence, however, failed to establish a single method of devolution for both real and personal property, yet, to the extent it attempted to apply

lawful descendants in the direct line of lineal descent; and if there be but one person, then to him or her alone, and if more than one person, and all of equal degree of consanguinity to the ancestor, then the inheritance shall descend to the several persons as tenants in common, in equal parts, however remote from the intestate the common degree of consanguinity may be. . . .

"II. The second rule of descent is, that if a person dying seized, or as owner of land, leaves lawful issue of different degrees of consanguinity, the inheritance shall descend to the children and grandchildren of the ancestor, if any be living, and to the issue of such children or grandchildren as shall be dead, and so on to the remotest degree, as tenants in common. But such grandchildren and their descendants shall inherit only such share as their parents respectively would have inherited if living.

III. A third canon of inheritance, prevailing to a considerable extent in this country, is, that if the owner of lands dies without lawful descendants, leaving parents, the inheritance shall ascend to them, either first to the father and next to the mother, or jointly, under certain qualifications. . . .

"IV. If the intestate dies without issues or parents, the estate goes to his brothers and sisters, and their representatives. If there be several such relatives, and all of equal degree of consanguinity to the intestate, the inheritance descends to them in equal parts, however remote from the intestate the common degree of consanguinity may be. If they all be brothers and sisters, or nephews and nieces, they inherit equally; but if some be dead leaving issue, and others living, then those who are living take the share they would have taken if all had been living, and the descendants of those who are dead inherit only the share which their parents would have received if living. The rule applies to other direct lineal descendants of brothers and sisters, and the taking *per capita* when they stand in equal degree, and taking *per stirpes* when they stand in different degrees of consanguinity to the common ancestor, prevails as to collaterals, to the remotest degree, equally as in the descent to lineal heirs. . . .

"V. In default of lineal descendants, and parents, and brothers and sisters, and their descendants, the inheritance ascends to the grandparents of the intestate, or to the survivor of them. . . .

"VI. In default of lineal descendants, and parents, and brothers and sisters, and their descendants, and grandparents, the inheritance goes to the brothers and sisters, equally of both the parents of the intestate, and their descendants. If all stand in equal degree of consanguinity to the intestate, they take *per capita*; and if in unequal degree, they take *per stirpes*. . . .

"VII. If the inheritance came to the intestate of the part of his father, then the brothers and sisters of the father, and their descendants, shall have preference; and, in default of them, the estate shall descend to the brothers and sisters of the mother, and their descendants. But if the inheritance came to the intestate on the part of his mother, then her brothers and sisters, and their descendants, have the preference; and, in default of them, the brothers and sisters on the father's side, and their descendants, take. . . .

"VIII. On failure of heirs under the preceding rules, the inheritance descends to the remaining next of kin to the intestate, according to the rules in the English statute of distributions of the personal estate, subject to the doctrine in the preceding rules in the different states, as to the half-blood, and as to ancestral estates, and as to the equality of distributions." 4 KENT'S COMMENTARIES, 375-413 (13th Am. ed. 1884).

the statute's principles of equal division in the descent of realty, it was a step in that direction.

The problem in New York, therefore, was the same as in England after 1072 and before 1837 and 1853, that is, how was a reunion of the law of wills and testaments, on both the substantive and procedural sides, and a reunion of the law of the devolution of real and personal property, to be brought about?

IX. THE REUNION OF THE LAW OF TESTATE AND INTESTATE SUCCESSION IN NEW YORK

A. *As to the Substantive Law of Wills and Testaments.*—Prior to the enactment of the first English Wills Act of 1540,¹⁵³ which was in force in the Province of New York, the only formality on execution required for a will of real estate was that it be in writing.¹⁵⁴ After 1691, according to Fowler,¹⁵⁵ the Statute of Frauds, as enacted in England, was regarded as extended to England, thus expanding the requirements as to execution of wills to include, above that of writing, that a will of a freehold estate should include the additional formalities of a signature by the testator, or by some other in his presence and by his direction, and attestation by three or four credible witnesses in the presence of the testator. Under these two statutes, therefore, the same division between wills and testaments, as existed in England prior to 1831, operated in Provincial New York, or the formalities in execution provided by these statutes applied only to wills, not to testaments. This separation of the law of wills and testaments on the substantive law side continued until after the first state constitution in 1777, Section XXXV of which provided:

That such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the nine-

¹⁵³ 32 Hen. VIII, c. 1 & c. 5.

¹⁵⁴ Matter of Roe, 82 Misc. 567, 143 N.Y.S. 288 (1913).

¹⁵⁵ "The Statute of Frauds (29 Car. II [1676]) being enacted after New York had a legislature of its own, was not in force in New York *stricti juris*; but we had here earlier laws requiring deeds to be in writing. After 1691 the English statute was probably regarded as extending here, for otherwise why was it re-enacted in Jones and Varick's Revision?" FOWLER, HISTORY OF REAL PROPERTY LAW IN NEW YORK, c. IV, 78, n. 7 (New York, 1895).

teenth day of April, in the year of our Lord, one thousand seven hundred and seventy-five, shall be and continue the law of this state; subject to such alterations and provisions as the legislature of this state shall, from time to time, make concerning the same.¹⁵⁶

Under the authority of Section XXXV of the New York State Constitution, the Wills Act of 1540, with its several amendments, was reenacted.¹⁵⁷ These enactments were confirmed and carried by statute in 1801¹⁵⁸ and in 1813.¹⁵⁹ Until the Revision of 1830,¹⁶⁰ our law of wills corresponded with the law of wills in England and which had been in force in the Province of New York.¹⁶¹ Under the Revision of 1830, Section 40, now Section 21 of the New York Decedent's Estate Law, provided that "Every last will and testament of real and personal property," should meet the same formalities in execution, thus resulting in the reunion of the law of wills and testaments in New York on the substantive law side—a development which was to come a few years later in England.

B. *As to the Procedural or Probate Side of the Law of Wills and Testaments.*—But it still remained true that where both real and personal property were disposed of by the same will, a decree of probate admitting such instrument to probate, was only prima facie evidence as to title to real estate, but conclusive as to title to personalty in New York, following the common-law rule as developed by the ecclesiastical courts, although the reason for the rule in England, to-wit, the separation of the common-law and ecclesiastical courts by the Ordinance of 1072, never had been in existence in the State of New York. Apparently the courts of New York first faced this problem in the case of *Stewart's*

¹⁵⁶ NEW YORK STATE CONSTITUTION OF 1777, sec. XXXV.

¹⁵⁷ 2 Jones & Varick, 10th Section, c. XLVII, par. 2, 93 (March 3, 1787).

¹⁵⁸ 1 Kent & Radcliffe Revision, 24th Session, c. IX, par. 2, 178 (Feb. 20, 1801).

¹⁵⁹ Revised Laws of New York, 36th Session, c. XXIII, par. 2, 364 (1813).

¹⁶⁰ Revised Statutes of New York, c. 6, tit. I, Art. III, sec. 40, 63 (1829), to become operative January 1, 1830.

¹⁶¹ "In *Gryle v. Gryle* [2 Atk. 176, 26 Eng. Rep. 176], in the year 1741, it was again argued that, if the witnesses did not act together on one occasion, the testator might be sane when some attesting witnesses attested, and insane when others attested. But the court held that the old statute of wills, as amended by the statute of frauds, did not require the simultaneous presence of the attesting witnesses. This decision was binding on the Privy Council and consequently on appeals from the Province of New York. Thus the law of New York was fixed." *In re Roe's Will*, 82 Misc. 565, 143 N.Y.S. 999, 1001 (Surr. Ct., N.Y. Co., 1913).

Exr's v. Lispenard,¹⁶² in which the Court of Errors, in a case where the will mingled the disposition of real and personal property and was contested on the ground of a lack of testamentary capacity, held that the testator was competent to execute the will and that the personalty passed under it, while in a subsequent action of ejectment to probate the will, a jury found that the testator was incompetent and hence the realty passed as in the case of intestacy.

In the case of *In re Goldsticker's Will*,¹⁶³ decided as late as 1908, in which the court held that a will devising realty and bequeathing personalty was conclusive evidence as to the title to the personalty but only prima facie evidence as to title to realty, Chief Justice Cullen, of the Court of Appeals, declared:

The general principle that a judgment or final determination in a judicial proceeding concludes the parties thereto upon all matters necessarily decided therein whenever they are put in issue in other litigations is unquestioned. Nor can it be well questioned that this principle obtains as to decrees of surrogate's or probate courts on other matters than the probating of wills. 1 Freeman on Judgments (4th ed.) § 319b; 2 Black on Judgments, § 633. That this proposition should be open to limitations or to doubt as to the decrees of such courts on the admission or rejection of wills arises from two circumstances: *First*, at common law the factum of a will was as to real estate solely cognizable by courts of law, while as to personalty it was within the exclusive jurisdiction of the ecclesiastical courts; and, *second*, the peculiar and somewhat loose method of procedure in the ecclesiastical courts (which is the original source of our own procedure; *Matter of Brick Estate*, 15 Abb. Prac. 12 [1862]) on the probate of wills. The title of the executor was derived from his letters testamentary, for which the probate of the will was necessary. The title to real estate under a will could be asserted in an action at law, the same as under a deed or any other source of title, although the will had never been proved in the ecclesiastical courts (*Harris v. Harris*, 26 N. Y. 433 [1863]), and it followed that a decree in that court was without force or effect in an action at law as to the realty. The converse of that proposition was also true that a judgment in an action at law was without force in the probate proceedings in the

¹⁶² 26 Wend. 255 (N.Y. 1841).

¹⁶³ 192 N.Y. 35, 84 N.E. 581 (1908).

ecclesiastical courts, . . . See *Delafield v. Parish*, 25 N. Y. 28 [1862]. The Revised Statutes provided for the probate of wills of real estate in the surrogate's court, but the effect of such probate was merely to effect a record of the will, which record could be offered in evidence in lieu of the original, the same as the record of a deed. Subsequently the probate before the surrogate of a will of realty was made presumptive evidence of its valid execution. In *Corley v. McElmeel*, 149 N. Y. 228, 43 N.E. 628 [1896], relying on the general principle of the conclusiveness of judgments and the fact that the Code did not provide in terms for the effect of a decree rejecting a will, the appellants contended that such decree was conclusive against the devisees in an action of partition. This contention was over-ruled by this court. Our decision was not, however, based on the omission of the Code to specify the effect of the decree rejecting a will, but on the ground that at common law the decree of the probate court was not conclusive in actions relating to real estate, and, as in such actions the parties had been entitled to a determination of the question of the valid execution of the will by a jury, that it was doubtful at least whether the Legislature could deprive them of that right.

With the law in this state, and perhaps as a direct result of *In re Goldsticker's Will*,¹⁶⁴ decided in 1908, the Legislature of New York in 1910 took cognizance that the general principle that a judgment or final determination in a judicial proceeding concludes the parties to all matters necessarily decided therein, had no application to decrees of probate involving wills which included in their disposition both real and personal property. They realized that this exception to the general rule was a hangover from the common law, but there is nothing in the New York decisions or in the statutory annotations to indicate that anyone at that time connected or traced the difficulty to the separation of the spiritual and lay courts by the Ordinance of William the Conqueror in 1072. Notwithstanding this lack of light, the Legislature faced up to the issue and enacted a statute which read:

A decree admitting a will of real or personal property, or both, to probate is conclusive as an adjudication of the validity of the will, and of the question determined under section twenty-six hundred and twenty-four of this act, except as in this chapter otherwise provided."¹⁶⁵

¹⁶⁴ *Ibid.*

¹⁶⁵ Rev. Stat. of N.Y., Pt. II, c. 6, tit. 2, sec. 1; 2 Laws of N.Y. 1910; c. 578,

Thus, as by statutory enactment, a reunion of the law of wills and testaments on the procedural or probate side was realized in New York.

C. *As to the Devolution of Real and Personal Property.*—At common law, if a man died intestate owning both real and personal property, the question was, who took the realty by descent, and who took the personalty by distribution? If the person claiming to take was an heir he took according to the rules of descent as stated by Blackstone; if the person claiming to take was a distributee, he took according to rules of distribution as formulated by the Statute of Distributions. Each system, in its development, had been influenced by the Ordinance of William the Conqueror separating the spiritual and lay courts, and each system had revealed distinct and widely divergent characteristics, all of which were adopted in substance during the colonial period. Except for occasional modification by statute, or decision, these rules regulating the law of succession came down practically intact in New York until the year 1929, when the legislature abolished the distinctions between real and personal property, and in Section 83 of the Statute of Devolution,¹⁶⁶ made provision for the distribution of the property of intestate decedents, without regard to whether the property involved was real or personal. In framing the specific provisions of the statute, did the legislators adopt the parentelic scheme of descent as stated by Blackstone, the gradual scheme of distribution as formulated by the Statute of Distributions, or did it adopt a scheme of distribution of the decedent's property considered as a mass, in which were included the better features of the common-law canons of descent governing the distribution of freehold estates and the civil law rules of distribution as stated in the Statute of Distributions? The answer to this query can only be ascertained by setting out verbatim the sixteen paragraphs of Section 83 of the New York Statute of Devolution, and then commenting on whether each paragraph followed the canons of descent or the statutory rules of distribution. The first provision of Section 83 reads as follows:

sec. 1, p. 1416 (sec. 2625, Code of Civil Procedure); 2 Laws of N.Y. 1914, c. 443, p. 1812 (sec. 2625, Code of Civil Procedure); sec. 155 Surr. Ct. Act.

¹⁶⁶ N.Y. Laws 1929, amending N.Y. Laws 1909, Real Property Law, Art. III. Effective Sept. 1, 1930.

"The real property of a deceased person, male or female, not devised, shall descend, and the surplus of his or her personal property, after payment of debts or legacies, and if not bequeathed, shall be distributed to the surviving spouse, children or next of kin or other persons, in the manner following:¹⁰⁷

"1. One-third part to the surviving spouse, and the residue in equal portions to the children, and such persons as legally represent the children if any of them have died before the deceased.

["One-third part" as used above, included both real and personal property.

The phrase "residue in equal portions to the children" means that the heirs shall take as tenants in common. The New York Statute in this respect thus followed the rule of partible distribution as laid down in the Statute of Distributions as opposed to the doctrine of primogeniture as laid down in Blackstone's Canons of Descent.

And the expression "and such persons as legally represent the children if any of them have died before the deceased," means that in this situation the New York Statute followed the doctrine of representation as stated in Blackstone's Canons of Descent.]

The first paragraph was therefore taken partly from Blackstone's Canons of Descent and partly from the Statute of Distributions.

2. If the deceased leaves a surviving spouse and both parents surviving, and no child or descendant, the surviving spouse shall take five thousand dollars and one-half of the residue, and the parents shall each take one-half of the balance; if there be no surviving spouse, the parents shall each take one-half of the whole.

[The phrase, "the parents shall each take" a certain share, introduces descent in the ascending scale so as to include parents and grand-parents, which policy was adopted from the Statute of Distributions, as opposed to the Canons of Descent which provided that "inheritances shall lineally descend, . . . but shall never lineally ascend." The rule as stated by Blackstone was an

¹⁰⁷ The material enclosed in brackets consists of comments on each paragraph of section 83, showing whether the provisions of each section were taken from Blackstone's Canons of Descent or the Statute of Distributions.

outgrowth of the feudal system, under which one man could not be the lord and heir of the same piece of land, while the rule as stated in the statute constituted a reversion to the rule which prevailed in England in Saxon times.]¹⁶⁸

3. If the deceased leaves one parent surviving, and no child or descendant, and a surviving spouse, the surviving spouse shall take five thousand dollars and one-half of the residue, and the surviving parent shall take the balance; if there be no surviving spouse, the surviving parent shall take the whole.

[This paragraph is merely an extension or expansion of descent in the lineal ascending scale.]

4. If the deceased leaves a surviving spouse, and no descendant, parent, brother or sister, nephew or niece, the surviving spouse shall be entitled to the whole thereof; but if there be a brother or sister, nephew or niece, and no descendant or parent, the surviving spouse shall take ten thousand dollars and one-half of the residue, and the balance shall descend and be distributed to the brothers and sisters and their representatives.

[The phrase "and the balance shall descend and be distributed to the brothers and sisters and their representatives" follows Blackstone's Canons of Descent in permitting collaterals to inherit, without the common law limitations that such inheritance must be limited to those collateral relations who were of the blood of the first purchaser. The phrase "and their representatives" was taken from the Statute of Distributions, under which it was interpreted as prohibiting representation of collaterals further than by children of the intestate's brothers and sisters.]¹⁶⁹

5. If there be no surviving spouse, the whole thereof shall descend and be distributed equally to and among the children, and such as legally represent them.

[The statement, that "the whole thereof shall descend and be distributed equally to and among the children," makes the children tenants in common, in accordance with the Statute of Distributions, as pointed out in paragraph one. And the phrase

¹⁶⁸ REPPY AND TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS*, c. II, 69 (Chicago, 1928).

¹⁶⁹ *Carter v. Crawley*, 1 Freeman 297, 89 Eng. Rep. 215, 216 (1680); *Id.*, Sir T. Raym. 496, 83 Eng. Rep. 259 (1681).

"and such as legally represent them," again, as in paragraph one, introduces the doctrine of representation taken from Blackstone's Canons of Descent, under which the taking is called succession *in stirpes*, or according to the root, since all branches inherit the same share that their root, whom they represent, would have done. Of course, where the heirs stand in the same degree, they take *per capita*, and not *per stirpes*.]

6. If there be no surviving spouse, and no children, and no representatives of a child, and no parent, the whole shall descend and be distributed to the next of kin, in equal degree to the deceased; and if all the brothers and sisters of the intestate be living, the whole shall descend and be distributed to them; if any of them be living and any be dead, *per stirpes*, to the brothers and sisters living, and the descendants in whatever degree of those dead.

[Under paragraph 6, under the prescribed conditions the collateral descendants are permitted to inherit the entire estate as tenants in common if they stand in equal degree of consanguinity. This provision follows the Canons of Descent, but without the limitation that the collateral kinsman must be of the whole blood and without any preference of male over female. The elimination of these exclusive devices from the New York Statute reflects the spirit of liberality which distinguished the Statute of Distributions. This paragraph also adopted the common-law doctrine of representation among collaterals, under which the children of deceased brothers and sisters took *per stirpes*.]

7. If the deceased was illegitimate and leave a mother, and no child, or descendant, and no surviving spouse, such mother shall take the whole and shall be entitled to letters of administration in exclusion of all other persons. If the deceased shall leave a surviving spouse, the surviving spouse shall take five thousand dollars and one-half of the residue, and the mother shall take the balance. If the mother of such deceased be dead, the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate, and be entitled to letters of administration in the same order.

[At common law an illegitimate child had no inheritable blood, hence could not be regarded as the heir of either his father

or mother, and his own heirs were limited to his body. Following the spirit of the canon law which permitted legitimation upon subsequent marriage after a child was born out of wedlock, this provision of the New York Statute permits a mother to inherit from an illegitimate child, and if the mother of a deceased illegitimate child be dead, the deceased's relatives on the part of the mother are entitled to take collaterally. This course of procedure was completely prohibited under Blackstone's Canons of Descent.]

8. Where the distributees of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal.

[This paragraph again merely applies the rule of partible distribution in a given factual situation, and of course follows the Statute of Distributions.]

9. When such distributees are of unequal degrees of kindred, the whole shall descend and shall be distributed to those entitled thereto, according to their respective stocks; so that those who take in their own right shall receive equal shares, and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled.

[The doctrine of representation as set forth in this paragraph of the Statute follows Blackstone's Canons of Descent, making the rule applicable to both real and personal property in mass, those standing in equal degrees taking *per capita*; those standing in unequal degrees according to their respective roots or *per stirpes*.]

10. No representation shall be admitted among collaterals after brothers' and sisters' descendants.

[This paragraph limiting representation among collaterals was taken directly from the Statute of Distributions.]

11. Relatives of the half-blood shall take equally with those of the whole blood in the same degree; and the representatives of such relatives shall take in the same manner as the representatives of the whole blood.

[Under this provision of the New York Statute of Devolution, the next of kin, following the lead of the Statute of Distributions, were determined by the civil law,¹⁷⁰ under which the half-blood

¹⁷⁰ 2 KENT'S COMMENTARIES, 423 (13th Am. ed. 1884).

were admitted on an equal basis with the whole blood. And the doctrine of representation, which found its way into both the Canons of Descent and the Statute of Distributions, was made applicable in the same manner as in the case of the whole blood.]¹⁷¹

12. Descendants and other distributees of the deceased, begotten before his death, but born thereafter, shall take in the same manner as if they had been born in the lifetime of the deceased, and had survived him.

[This provision of the Statute, permits posthumous children to take equally with the other children, whether of the whole or half-blood. This was decided in *Burnett v. Mann*,¹⁷² which construed the English Statute of Distributions, from which ours is derived.]

13. If a woman die, leaving illegitimate children, or the legitimate descendants of deceased illegitimate children and no lawful issue, such children or descendants inherit her real and personal property as if such children were legitimate.

[This paragraph permits an illegitimate child to inherit from its mother, which was within the spirit of the canon law and its statutory product—the Statute of Distributions. Such a result would have been wholly inimical to the Statute of Merton¹⁷³ and Blackstone's Canons of Descent.]¹⁷⁴

14. If there be no husband or wife surviving and no children, and no representatives of a child, and no other distributees as hereinbefore provided, then the whole estate shall descend and be distributed to a surviving child of the husband or wife of the deceased, or if there be more than one, it shall descend and be distributed to them equally.¹⁷⁵

[This paragraph permits inheritance in a situation not covered by Blackstone's Canons or the Statute of Distributions, but it is within the spirit of the Statute.]

15. If there be no husband or wife surviving and no children,

¹⁷¹ *Watts v. Crooke*, 2 Vern. 124, 23 Eng. Rep. 689 (1690).

¹⁷² 1 Ves. 156, 27 Eng. Rep. 953 (1748).

¹⁷³ 20 Hen. III, c. 9 (1235).

¹⁷⁴ REPPY AND TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS*, c. II, 78 (Chicago, 1928).

¹⁷⁵ Repealed by N.Y. Laws 1938, c. 259, sec. 1.

and no representatives of a child, and no other distributees, and no child or children of the husband or wife of the deceased, then the whole shall descend and be distributed equally to the next of kin of the husband or wife of the deceased, as the case may be, and such next of kin shall be deemed next of kin of the deceased for all the purposes specified in this article or in article seven hereof; but such estate shall not, and shall not be construed to, embrace any real or personal property except such as was received by the deceased from such husband or wife, as the case may be, by will or by virtue of the laws relating to the descent and distribution of the estate of the deceased person.¹⁷⁶

[This paragraph recognized the existence of the ancestral estate in New York and of course was of common law origin and included in Blackstone's Canons of Descent.]

16. The right of an adopted child to take a share of the estate and the right of succession to the estate of an adopted child shall continue as provided in section one hundred and fourteen of the Domestic Relations Law.¹⁷⁷

[The right of an adopted child to inherit is completely a product of modern statutory enactment. Not being of the blood of the ancestor such a child could not inherit under the common law rules of descent, nor could he take by distribution.]

This rough survey of the various elements represented in the New York Statute of Devolution indicates that two-fifths of its provisions were taken directly from Blackstone's Canons of Descent and approximately three-fifths of its provisions from the Statute of Distributions. Or, to state the matter in another way, in principle and in spirit, the New York Statute and other modern statutes of devolution are composed of the better elements drawn from both the Canons of Descent and the Statute, with the preponderant influence in favor of the Statute of Distributions,¹⁷⁸ whose ancestry is said to reach as far back as the 118th Novel of Justinian's Institutes (A.D. 543).¹⁷⁹

¹⁷⁶ Repealed by N.Y. Laws 1920, c. 174, sec. 10.

¹⁷⁷ Renumbered as No. 14, and amended by Laws 1938, c. 259, sec. 2..

¹⁷⁸ 22 & 23 Car. II, c. 10 (1670).

¹⁷⁹ CUMIN, *MANUAL OF CIVIL LAW, INSTITUTES OF JUSTINIAN*, [B. 3, T. 9] 217 (2d ed., London, 1865).

X. CONCLUSION

Eight hundred and eighty-two years have elapsed since William the Conqueror in 1072 ordered the separation of the common law and ecclesiastical courts, thus setting in operation forces which have produced astounding changes in Anglo-Saxon law. The effect of that Act has neither run its full course, nor as yet have its full implications been understood or traced. It is, however, clear that many of the artificial distinctions between real and personal property originated with the famous Ordinance, which caused the substantive and procedural law of wills of real estate and testaments of personal property to flow down separate and distinct channels until reunited on the substantive law side of the Wills Act of 1837¹⁸⁰ and until reunited on the procedural law side by the Court of Probate Act of 1857.¹⁸¹ It is also clear that the distinctions between descent of freehold estates and the distribution of personalty was accentuated by the separation, not to be reunited on the side of devolution of the property of the decedent as a mass until the enactment of the Law of Property Act of 1922¹⁸² and the Administration of Estates Act of 1925.¹⁸³

In America generally and in New York in particular, wills of real estate had to meet the formalities in execution prescribed by the English Statute of Frauds, which had been followed in the colony, whereas testaments of personalty were not required to meet any specific formality in execution. In other words the situation as to wills and testaments in New York was the same as in England prior to 1837. This remained true until the Revised Statute of 1830¹⁸⁴ was enacted, under which the same formalities in execution were required for both wills and testaments, thus bringing about their reunion on the substantive law side some seven years prior to the time when the same development occurred in England.

But on the procedural side we had in New York the same incongruous situation which prevailed for almost a thousand years in England, to wit, that a decree admitting to probate a will which disposed of both real and personal property was conclusive

¹⁸⁰ 7 Wm. IV & 1 Vict. c. 26.

¹⁸¹ 20 & 21 Vict. c. 77.

¹⁸² 12 & 13 Geo. V. c. 16.

¹⁸³ 15 Geo. V. c. 23.

¹⁸⁴ Rev. Stat. of N.Y., Pt. II, c. 6, tit. I, Art. III, sec. 40 (1829).

evidence as to title to the personalty bequeathed thereunder, but at most only *prima facie* evidence as to title to realty.

The established method of probating a will of real estate in New York as in England, was by an action of ejectment, brought by the devisee if he found the heir in possession, or by the heir if he found the devisee in possession. Occasionally the title of the devisee under a will also became involved in equity where partition was sought without the devisee's title having been confirmed by some form of probate. In this connection, Jessup has said that if a testator made a will disposing only of realty and then appointed an executor, a decree of probate was only conclusive evidence as to title to personalty.¹⁸⁵ This entire situation was clarified by the Statute of 1910,¹⁸⁶ under which the decree of the Surrogate Court became conclusive evidence as to title to both real and personal property, thus reuniting in New York the law of wills and testaments on the probate side, making it no longer necessary for a devisee to try his title in ejectment. This occurred fifty-three years after the same development took place in England, although the condition which led to this development in England—the practice of the lay and spiritual judges sitting together as one court prior to William's order of separation—never had any existence in New York or in any other American colony.

Finally, the accentuation of the distinctions between personal and real property which resulted from the separation of the common law and spiritual courts, and which had a decided bearing on the development of the law of descent by the common law courts and the law of distribution by the spiritual courts, aided by Parliament's enactment of the Statute of Distributions,¹⁸⁷ was reflected in the colonial law prior to the Revolution, and after the Revolution by reason of the adoption of the common law so far as its rules were applicable to frontier conditions. These distinctions, which found expression on the descent side in Kent's *Canons of Descent* and in the statutes regulating distribution of personalty, subject to modification from time to time, remained in effect until

¹⁸⁵ 1 JESSUP, *THE LAW AND PRACTICE IN THE SURROGATES' COURTS IN THE STATE OF NEW YORK*, sec. 513, p. 1003 (New York, 1930). See also, *In Matter of McMillan*, 133 Misc. 570, 233 N.Y. Supp. 415 (1929).

¹⁸⁶ 2 Laws of N.Y. 1910, c. 578 (sec. 2625 of *Code of Civil Procedure*) p. 1416.

¹⁸⁷ 22 & 23 Car. III, c. 10 (1670).

the new Statute of Devolution of 1929,¹⁸⁸ under which the distinctions between real and personal property were abolished, thus reuniting the law of descent and distribution in favor of a single law regulating the devolution of an intestate decedent's property in New York.

By reason of the foregoing, it thus becomes clear that the substantive and procedural law of wills and testaments in New York and in the twelve other original colonies, and as a consequence, in the United States at large, as in England, was thrown into great confusion and was forced to develop along arbitrary lines as a result of the act of William the Conqueror in separating the common law and ecclesiastical courts in 1072; that the law of probate became the subject of endless and needless litigation, and the law of descent and distribution became so artificial and complicated as to become the despair of students, lawyers and judges. All these consequences and many more have flowed out of the blind adoption of a set of rules governing the law of succession in England, although these rules, the reasons for which were founded on grounds of feudal policy, never had any existence in America. Yet we continued on blindly trying to find in them some logic and to make them work. The whole story of this fantastic development is the finest example of the tenacity of the common law, of how a common-law rule, once firmly established, goes on down through the centuries, determining the destinies of those members of society who fall within its sweep, until the original reason for its creation becomes lost in the mists of antiquity.¹⁸⁹

¹⁸⁸ N.Y. Laws 1929, amending N.Y. Laws 1909, Real Property Law, Art. III.

¹⁸⁹ Section 83 of the New York Statute of Devolution, 13 McKinney Consol. Laws of N.Y., Art. III, p. 409, is not only important as showing a conjunction of the better elements of Blackstone's Canons of Descent and the Statute of Distributions, but it also is clearly related to certain sections of the New York Decedent Estate Law, such as sec. 17 (Charitable Bequests); sec. 18 (Right of Election); sec. 26 (After-Borns); sec. 29 (Legacies to Decedents or brothers and sisters of the testator who predeceased testator).

There are also several sections of the Surrogates' Court Act which are indirectly related to Section 83, specifically, secs. 118-123; secs. 146, 147 (Surrogates' Court Act, Probate of Wills); secs. 49-51 with reference to designation of persons interested in the estate.

It should also be observed that in spite of the fact that most people are advised to execute wills, approximately 80% of the persons dying, die intestate, so that the law of descent and distribution as set forth in Section 83 of the New York Statute of Devolution, applies to more people than does the law of testate succession.